(21,856.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, ET AL., PETITIONERS,

vs.

JOHN E. CARLAND, U. S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 14, 1910.

1 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1908, of said Court, before the Honorable Willis Van Devanter, and the Honorable Elmer B. Adams, Circuit Judges.

Attest:

[United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: the following proceedings, among others, were had in said United States Circuit Court of Appeals for the Eighth Circuit, and appear of record in said Court, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

THURSDAY, *April* 22, 1909.

No. 99, Orig.

JOHN C. MCCLELLAN et al., Petitioners,
vs.
JOHN E. CARLAND, United States District Judge for the District of South Dakota.

On Petition for Writ of Mandamus.

2 Upon consideration of the petition (or information) for a writ of mandamus, it is now here ordered by the Court, that leave be, and the same is hereby, granted to file and docket the same.

APRIL 22, 1909.

The petition referred to in the above order is in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, WALTER MCCLELLAN, and EDMUND MCCLELLAN, Petitioners,
vs.
JOHN E. CARLAND, United States District Judge for the District of South Dakota.

Petition for Writ of Mandamus.

To the Honorable Circuit Judges of the United States Holding said Court:

The above named petitioners respectfully state that on the 8th day of September, 1908, a suit was begun by them against George T.

Blackman, special administrator of the estate of John McClellan, deceased, in the Circuit Court of the United States for the District of South Dakota, Southern Division, by the filing of their Bill of Complaint in said Court, a true copy whereof is hereto annexed and marked Exhibit "A" and made a part hereof.

That on the 25th day of September, 1908, the said George T. Blackman, defendant, made and filed his Answer to the said Bill of Complaint, a true copy of which answer is hereto annexed and marked Exhibit "D" and made a part hereof.

That on the 28th day of October, 1908, these petitioners duly made and filed their replication to said answer, a true copy whereof is hereto annexed, marked Exhibit "C" and made a part hereof.

3 That on the 24th day of November, 1908, the State of South Dakota made application to the said Circuit Court for leave to file a petition for intervention and obtained from said Court an order requiring these petitioners and the defendant, George T. Blackman, to show cause before said Court why leave should not be granted to the State of South Dakota to intervene as a party in said action or suit which had been begun as aforesaid by these petitioners; that a copy of said order to show cause is hereto annexed and marked Exhibit "D" and made a part hereof.

That a return to said order to show cause was duly filed on behalf of these petitioners and the matter of the said order to show cause coming on for hearing before said Court on the 21st day of December, 1908, and the Court having heard arguments for and against the granting of said petition, and having taken the said matter under advisement, on the 4th day of January, 1909, made and entered an order over-ruling the motion of the said State of South Dakota for leave to intervene, which order over-ruling said motion is hereto annexed, marked Exhibit "E" and made a part hereof.

That upon the 18th day of March, 1909, the said Circuit Court in pursuance of the order heretofore set out and marked Exhibit "E" and upon a showing made by the affidavit of the State's Attorney within and for the County of Minnehaha and State of South Dakota, made a further order staying proceedings of the said suit brought in said Court by these petitioners, which further order is hereto annexed, marked Exhibit "F" and made a part hereof.

That thereafter and on the 29th day of March, 1909, these petitioners through their attorneys made application to the said Circuit Court for an order requiring the State of South Dakota and the Attorney General thereof, and the County of Minnehaha and State's Attorney thereof, to show cause before the said Court why the said orders so made, towit: the order Exhibit "E" and the order

4 Exhibit "F" should not be vacated and set aside and why the suit of these petitioners should not proceed immediately to a speedy hearing and determination of the same, which order to show cause was granted by the said Court, a true copy whereof is hereto annexed, marked Exhibit "G" and made a part hereof.

That the State of South Dakota, through the Attorney General thereof, and the County of Minnehaha, through the State's Attorney thereof, made a return to the said order on them to show cause, and

the matter coming on for hearing before the said Circuit Court on the 14th day of April, 1909, and having been duly considered, the Court entered an order over-ruling the application contained in the said order to show cause, which order so over-ruling the said application is hereto annexed and marked Exhibit "H" and made a part hereof.

Your petitioners further allege that the said orders staying proceedings, Exhibit "E" and Exhibit "F," have never been vacated or set aside; that the said order, Exhibit "H," refusing to vacate and set aside the said order staying proceedings has never been vacated or set aside. That said orders were made by the said Circuit Court arbitrarily and unlawfully, and in violation of the right which your petitioners have under the constitution and laws of the United States, to have their said action in the Circuit Court tried by the said Court in the ordinary course of procedure, and that your petitioners have no remedy by appeal or writ of error to review the said orders.

Wherefore: your petitioners pray that this Court issue to the Honorable John E. Carland, District Judge of the United States for the District of South Dakota and holding the Circuit Court in said District, a writ of mandamus, commanding him to vacate and set aside said orders staying proceedings in said action and to proceed to try and determine said action in the usual course of procedure, without regard to the pendency of the proceeding, hereinbefore alleged, now pending in the Courts of the State of South Dakota.

GRIGSBY & GRIGSBY,
Attorneys for Petitioner, Sioux Falls, South Dakota.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

I, Melvin Grigsby, one of the attorneys for the petitioners mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief. Those statements made on my own knowledge I know to be true and those statements made upon information and belief I verily believe to be true, and I have read said petition.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 20th day of April, 1909.

[SEAL.]

SIOUX K. GRIGSBY,
Notary Public, South Dakota.

EXHIBIT "A."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States for the District of South Dakota, in Chancery Sitting:

John C. McClellan, a citizen and resident of Ellis County, in the State of Texas, James S. McClellan, a citizen and resident of
6 Pulaski County, in the State of Arkansas, William S. McClellan, a citizen and resident of Teller County, in the State of Colorado, and Walter McClellan and Edmund McClelland, both of whom are citizens and residents of Allegheny County, in the State of Pennsylvania, bring this their bill of complaint against George T. Blackman, a citizen and resident of the State of South Dakota, as special administrator of the estate of John McClellan, deceased, and thereupon your orators, and each of them complain, allege and show to the Court:

First.

That John McClellan, whose true name was John McClelland, was a citizen and resident of the County of Minnehaha and State of South Dakota, died, intestate, on or about the 31st day of August, 1899, in the City of Sioux Falls, County of Minnehaha and State of South Dakota, and that said deceased left an estate in the aforesaid county and state consisting of real and personal property of the value at the time of his death, aforesaid, so far as is known to these complainants of about the sum of Thirty-three Thousand Dollars ($33,000.00).

Second.

That thereafter and on or about the 8th day of February, 1900, the County Court in and for said County of Minnehaha and State of South Dakota, after due and regular proceedings therein, made, filed and entered its order and issued letters of administration to one William Van Eps of said County and State, as administrator of the said estate of said John McClellan, deceased. That said William Van Eps duly qualified as such administrator and did take possession of the said estate and held possession thereof until on or about the 12th day of July, 1906, when the said William Van Eps departed this life.

Third.

That thereafter such proceedings were had in the said County Court in the matter of the said estate, that on or about the 17th day of September, 1906, the said Court made, filed and en-
7 tered its order and issued letters of special administration to George T. Blackman, defendant above named, as special administrator of the said estate. That the said George T. Blackman did then and there qualify as such special administrator and did then and there take possession of the said estate and ever since has been and is now the duly appointed, qualified and acting special administrator of the said estate of John McClellan, deceased.

Fourth.

Your orators further allege and show that the value of the said estate of said John McClellan, deceased, situated and located within the State of South Dakota, and now in the possession and control of said George T. Blackman, as special administrator thereof, was on the first day of June, 1907, in excess of the sum of Thirty-five Thousand Dollars ($35,000.00); that the said estate at that time consisted of real estate situated in the City of Sioux Falls, County of Minnehaha and State of South Dakota, and farm lands in the County of Davison, State of South Dakota, cash in the hands of the said George T. Blackman, bank stock and certain miscellaneous notes and other personal property.

That since the said first day of June, 1907, the said George T. Blackman, as admininstrator, has rented, and collected, the rents from certain of the real estate and farming lands belonging to said estate and has deposited certain of the said cash in hand so as to obtain interest thereon for the benefit of said estate.

Fifth.

Your orators further allege and show that there are no outstanding claims against the said estate and that all the creditors of the said John McClellan, deceased, have been paid and that the said estate is now ready for distribution thereof according to the Statutes of the State of South Dakota in such cases made and provided.

Sixth.

Your orators further allege and show that the value of the
8 said estate of said John McClellan, deceased, situated and located within the state of South Dakota, and now in the possession and control of said George T. Blackman, as special administrator thereof, is in excess of the sum of Thirty-five Thousand Dollars ($35,000.00) and that there are no outstanding claims against the said estate and that all the creditors of the said John McClellan, deceased, have been paid and that the said estate is now ready for distribution thereof according to the Statutes of the State of South Dakota in such cases made and provided.

Seventh.

Your orators further allege and show that the said John McClellan, deceased, was born in the Parish of Skryne in the County of Meath, Ireland, on or about the year A. D. Eighteen Hundred and Twenty-one (1821) and that thereafter and on or about the 26th day of February A. D. 1846, the said John McClellan, deceased, was duly and legally married to one Hannah Cruikshank in the Parish Church in said Parish of Skryne, County of Meath, Ireland.

Eighth.

That three sons were born of said marriage of which are the complainants, John C. McClellan, James S. McClellan and a third son, William S. McClellan; that the said William S. McClellan departed this life on or about the year A. D. 1888, leaving three sons, who are your complainants William S. McClellan, Walter McClellan and Edmund McClellan.

Ninth.

Your orators further allege and show that the complainants John C. McClellan and James S. McClellan are sons and the complainants William S. McClellan, Walter McClellan and Edmund McClellan are the grandsons of the said John McClelland, deceased, and that your orators are the sole surviving heirs at law and next of kin of the said deceased and are lawfully entitled to inherit the
9 estate of the said deceased under and by virtue of the laws and statutes of the said State of South Dakota.

In consideration whereof, and inasmuch as your orators have no sufficient remedy at law and are only relievable in a court of equity where matters of this character are cognizable and reviewable, to the end, therefore, that your orators may obtain the relief to which they are justly entitled in the premises, and which they can only obtain in a court of equity, your orators pray the court to grant them due process by subpœna directed to said George T. Blackman, as special administrator of the estate of John McClellan, deceased, commanding and requiring him to appear herein and answer, but not under oath, the same being expressly waived, the several allegations in this your orator's bill contained.

And your orators further pray that upon a final hearing it be ordered and decreed that your complainants John C. McClellan and James S. McClellan are sons and your complainants William S. McClellan, Walter McClellan and Edmund McClellan are grandsons of said John McClellan, deceased, and that your orators are the sole surviving heirs at law and next of kin of said deceased and entitled to inherit the said estate; and that the title in fee to all of the said real estate is in them, the said complainants, and that it be further ordered and decreed that the said George T. Blackman, special administrator and defendant herein, render a just and true account of all the moneys and credits, bank stock, rents and interest collected and other personal property now in his hands belonging to the said estate and that, after deducting his lawful fees and ex-

penses lawfully incurred as such administrator, he distribute all of the personal property in his hands, as such special administrator, according to the laws of the State of South Dakota in such cases made and provided, towit: To complainants John C. McClellan and James S. McClellan one-third to each thereof, and to complainants William S. McClellan, Walter McClellan and Edmund McClellan to each, one-ninth thereof, and failing so to do that these complainants may have judgment against him, the said George T. Blackman, as special administrator, for the total value of all of the said personal property found to be in his hands and under his control.

That pending a determination of this suit the said George T. Blackman, as special administrator aforesaid, be directed and acquired to hold intact the said estate, and both real and personal property thereof, and that he may be enjoined pendente lite from disposing or attempting to dispose of, or from distributing, and from assigning or turning over to any person or persons whatsoever, the said estate or any part thereof until further order of this Court in the premises; and that the Court grant such other and different relief herein as may be equitable and just.

And your orators as in duty bound will ever pray;

JOHN C. McCLELLAN,
JAMES S. McCLELLAN,
WILLIAM S. McCLELLAN,
WALTER McCLELLAN,
EDMUND McCLELLAN,
By GRIGSBY & GRIGSBY,
Solicitors and of Counsel for Complainants,
Sioux Falls, S. Dak.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Personally appeared Melvin Grigsby, who being first duly sworn, deposes and says: That he is a member of the firm of Grigsby & Grigsby, solicitors and of counsel for the complainants above named; that he has read the foregoing replication to answer and bill of complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the reason that this verification is not made by the said complainants or either of them is that none of the said complainants are residents of or now within the County of Minnehaha and State of South Dakota, wherein deponent resides.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 8th day of September, A. D., 1908.

[SEAL.]

A. B. MULLER,
Notary Public South Dakota.

11 EXHIBIT "B."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Answer.

Comes now the defendant in the above entitled action and for answer to the bill of complaint therein:

I.

Admits the first, second, third and fourth paragraphs thereof.

II.

As to every other allegation, statement and charge in said complaint contained defendant has no knowledge or information sufficient to form a belief and therefore denies the same.

III.

Defendant represents to this honorable court that he now holds and, until the order or judgment of this court to the contrary, will continue to hold, the property described in said bill of complaint to be desposed of agreeable to the judgment or order of this court, and disclaims any interest in and to said property or any part thereof save only in his official capacity as Special Administrator of the Estate of John McClellan, deceased.

GEORGE T. BLACKMAN, *Defendant.*

12 EXHIBIT "C."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Replication to Answer.

Replication of Complainants in the Above Cause to the Answer of George T. Blackman, Special Administrator of the Estate of John McClellan, Deceased.

These repliants, saving and reserving all advantage of exception to the manifold insufficiencies of said answer, for replication thereto sayeth that they will aver and prove their said bill to be true and sufficient, and that the said answer is untrue and insufficient; wherefore repliants further pray relief as in said bill set forth.

JOHN C. McCLELLAN,
JAMES S. McCLELLAN,
WILLIAM S. McCLELLAN,
WALTER McCLELLAN,
EDMUND McCLELLAN,
By GRIGSBY & GRIGSBY,
Solicitors and of Counsel for Complainants,
Sioux Falls, S. Dak.

Filed October 28th, 1908. (November Rules.)

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

13 Personally appeared Melvin Grigsby, who being first duly sworn, deposes and says: that he is a member of the firm of Grigsby & Grigsby, solicitors and of counsel for the complainants above named; that he has read the foregoing replication to answer and knows the contents thereof and that the same is true to *be* the best of his knowledge, information and belief; that the reason that this verification is not made by the said complainants or either of them, is that none of the said complainants are residents of or now within the County of Minnehaha and State of South Dakota, wherein deponent resides.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 28th day of October, A. D. 1908.

[SEAL.]

E. E. RODABAUGH,
Notary Public, South Dakota.

EXHIBIT "D."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant; The State of South Dakota, Intervenor.

Order on Petition for Intervention.

The petition of the state of South Dakota for leave to intervene herein, duly verified by S. W. Clark, Attorney General of the State of South Dakota and by Alpha F. Orr, State's Attorney within and for the County of Minnehaha, in said State of South Dakota, having been presented to the court by U. S. G. Cherry as Special
14 Counsel for the said State of South Dakota and for the said Attorney General and said State's Attorney and the same having been fully considered it is:

Ordered that leave be and the same is hereby granted to file the said petition herein; that the 21st day of December, at the hour of ten o'clock A. M. of that day is hereby fixed as the time and the court room of the said court in the Federal Building at the city of Sioux Falls in the said state, is fixed as the place for hearing upon the said petition; that a copy of the said petition and this order be served upon the said complainants or their said counsel Grigsby & Grigsby and upon the said defendant, or his said counsel, Aikens & Judge, at least 15 days before the date herein fixed for hearing, as aforesaid and that the said complainants and the said defendant show cause, if any they have, before this court at the said time and place herein fixed for such hearing or as soon thereafter as counsel can be heard, why leave should not be granted to the said State of South Dakota to intervene as a party to this action and why the said complainants herein should not answer the said petition within such time as may be fixed by the order of the court upon such hearing and that in case of the failure of the said complainants so to do, then that the said petition be taken as confessed by the said complainants and that a decree be entered herein accordingly and that the said complainants, at said time and place, further show cause, if any they have, why leave should not be granted to the said State of South Dakota to plead, demur, or reply to the said answer of the

said complainants herein, if such answer shall be made and to take and have such other proceedings herein as may be granted, ordered and allowed and as may be just and equitable.

Done at the city of Sioux Falls, in the said District of South Dakota this 24th day of November, 1908.

By the Court,

JOHN E. CARLAND, *Judge.*

Attest:

O. S. PENDAR, *Clerk.*

15 EXHIBIT "E."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant; The State of South Dakota, Intervenor.

The above entitled cause coming on for hearing before the Court, pursuant to the petition filed herein by leave of the court, by the state of South Dakota, for leave to intervene herein and upon the Order to Show Cause based upon the said petition returnable herein on the 21st day of December, 1908; S. W. Clark, Attorney General within and for the state of South Dakota, Alpha F. Orr, State's Attorney within and for the county of Minnehaha, and U. S. G. Cherry, as Special Counsel for the said state of South Dakota, all appearing in behalf of the said state of South Dakota, and Grigsby & Grigsby solicitors for the complainants, appearing in opposition to the said petition and order to show cause, and the Court having heard the arguments of counsel and being fully advised in the premises; Now, on all the proceedings hereinbefore had it is

Ordered, That the motion of the said state of South Dakota for leave to intervene herein be and the same is overruled and denied and it is

Further ordered that the further prosecution of this action be and the same is hereby stayed for a period of ninety days from and after December 24th, 1908, for the purpose of allowing the state of South Dakota to commence a proper action or proceeding in the
16 proper court to establish its alleged title and interest in and to the said property and estate of the said decedent and that in the event that such action is commenced within this time, then that this action and the prosecution thereof be further stayed until the determination of such action brought by the state of South Dakota and that in case no such action is commenced by the state of South

Dakota within the time herein specified, then that this action shall proceed as equity and justice may require.

Done at Sioux Falls, South Dakota this 4th day of January, 1909.

By the Court:

JOHN C. CARLAND, *Judge.*

Attest:

[Seal of Court.]

OLIVER S. PENDAR, *Clerk,*
By ODIN R. DAVIS, *Deputy.*

(Endorsed:) No. 538 S. D.—Circuit Court of the United States, District of South Dakota, Southern Division—John C. McClellan et al. vs. George T. Blackman, Special Administrator of the Estate of John McClellan, Deceased—Order overruling and denying motion of State of South Dakota for leave to Intervene and staying prosecution for period of 90 days from Dec. 24, 1908.—Filed January 4, 1909, Oliver S. Pendar, Clerk. By Odin R. Davis, Deputy.

EXHIBIT "F."

In the *District* Court of the United States for the District of South Dakota, Southern Division.

17 JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Plaintiffs,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Order Staying Proceedings.

On the affidavit of George J. Danforth, State's Attorney within and for the county of Minnehaha and State of South Dakota, and on all the files, pleadings and proceedings hereinbefore had, and on application of said Danforth as State's Attorney within and for the said County and S. W. Clark, Attorney General within and for state of South Dakota, and U. S. G. Cherry as special counsel for said State's Attorney and Attorney General,

It is hereby ordered that the further prosecution of the above entitled action by the said complainants be, and the same is hereby stayed until the determination of that certain action now pending in the Circuit Court within and for the county of Minnehaha in the State of South Dakota, wherein the state of South Dakota is complainant and Edward J. Taber and other persons therein designated by name *as* defendants, and all persons unknown having or claiming to have any right, title or interest in or to the estate of the said John

McClellan deceased, are also defendants, has been determined or until the further order of the court herein.

Done at Sioux Falls, S. D. this 18th day of March, 1909.

JOHN E. CARLAND, *Judge.*

Attest:

[SEAL.] OLIVER S. PENDAR, *Clerk.*

18 EXHIBIT "G."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClelland, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Order to Show Cause.

To the State of South Dakota and Attorney General thereof and the County of Minnehaha and State's Attorney thereof:

You will please take notice: that upon consideration of the annexed affidavit and petition of Melvin Grigsby, the court being duly advised in the premises and reason therefor appearing, it is hereby;

Ordered that you and each of you show cause before this court at the U. S. Postoffice building in the City of Sioux Falls, County of Minnehaha and State of South Dakota, on the 12th day of April, 1909, at ten o'clock A. M. of that day why the orders of this court staying proceedings herein, dated respectively January 4, 1909, and March 18, 1909, should not be vacated and set aside and why this suit should not proceed immediately to a speedy hearing and determination of the same, according to the statutes of the United States and rules of this court; that a copy of this order and the said affidavit and petition of said Melvin Grigsby be forthwith served upon George J. Danforth, state's attorney within and for said County and State.

Dated this 29th day of March, 1909.

By the Court:

JOHN E. CARLAND, *Judge.*

19 EXHIBIT "H."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Order.

The order to show cause, returnable on the 12th day of April, 1909, and adjourned by consent to the date hereof, why the order made by this court staying proceedings herein, dated respectively January 4th, 1909, and March 18th, 1909, should not be vacated and set aside, and why this suit should not proceed immediately to a speedy hearing and determination of the same, coming on regularly for hearing at the court room in the Federal Building in the city of Sioux Falls, in the said district, Grigsby & Grigsby appearing in support of the same and S. W. Clark, George J. Danforth and U. S. G. Cherry appearing in opposition thereto, and the court having heard the arguments of counsel and being fully advised in the premises and having fully considered the matter, it is hereby ordered:

That the application contained in the said Order to show cause be and the same hereby is in all things overruled and denied.

Dated at Sioux Falls, South Dakota this 14th day of April, 1909.

By the Court:

JOHN E. CARLAND, *Judge.*

Attest:

[SEAL.] OLIVER S. PENDAR, *Clerk.*

20 (Endorsed:) No. 99, Original. John C. McClellan, et al., Petitioners, vs. John E. Carland, United States District Judge for the District of South Dakota. Petition for Writ of Mandamus. Filed Apr. 22, 1909, John D. Jordan, Clerk.

(*Judgment.*)

And on the twenty-second day of April, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

No. 99, Orig.

JOHN C. McCLELLAN et al., Petitioners,
vs.
JOHN E. CARLAND, United States District Judge for the District of South Dakota.

On Petition for Writ of Mandamus.

THURSDAY, *April* 22, 1909.

This cause came on this day to be heard upon the original petition (or information) for a writ of mandamus, and was argued by Mr. Melvin Grigsby, of counsel for petitioners.

On Consideration Whereof, the Court being fully advised in the premises, it is now here ordered and adjudged that said petition for a writ of mandamus herein, be, and the same is hereby denied; and that the petition for such writ be, and the same is hereby, dismissed at the costs of the petitioners, except that no attorney's fee shall be taxed in favor of the respondent.

April 22, 1909.

21 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings in the case of John C. McClellan, et al., Petitioners, vs. John E. Carland, United States District Judge for the District of South Dakota, No. 99 Original, as full, true and complete as the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-seventh day of May, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] Supreme Court of the United States, October Term, A. D. 1909. John C. McClellan et al., Petitioners, vs. John E. Carland, United States District Judge for the District of South Dakota.

22 United States Circuit Court of Appeals, Eighth Circuit.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, WALTER MCCLELLAN, and EDMUND MCCLELLAN, Petitioners,
vs.
JOHN E. CARLAND, United States District Judge for the District of South Dakota.

Stipulation.

Whereas upon the application of the above named petitioners and upon a certified copy of the records and proceedings in this court herein a Writ of Certiorari was on the 16th day of November, 1909, issued by the Supreme Court of the United States of America directing and commanding this Court to send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done and;

Whereas a certified copy of all such records and proceedings is now on file in the said Supreme Court aforesaid and was filed therein at the time of the Petition for said Writ of Certiorari, now therefore;

It is hereby stipulated and agreed by and between the parties hereto that such certified transcript of record now on file in said Supreme Court of the United States of America shall be taken as a return to said Writ of Certiorari and that a certified copy of this stipulation be sent to said Supreme Court by the clerk of this court as his return to the said writ.

Dated at Sioux Falls, South Dakota, this 29th day of November, A. D., 1909.

GRIGSBY & GRIGSBY,
Attorneys and of Counsel for Above Named Petitioners.
JOHN E. CARLAND,
United States District Judge for the District of South Dakota.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 99 Orig. John C. McClellan, et al., Petitioners, vs. John E. Carland, U. S. District Judge, etc. Stipulation as to Return to Writ of Certiorari. Filed Dec. 1, 1909, John D. Jordan, Clerk.

23 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which John C. McClellan, James S. McClellan, William S. McClellan, Walter McClellan and Edmund McClellan, are petitioners, and John E. Carland, United States District Judge for the District of

South Dakota, is respondent, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

24 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixteenth day of November, in the year of our Lord one thousand nine hundred and nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

25 [Endorsed:] File No. 21,856. Supreme Court of the United States, No. 630, October Term, 1909. John C. McCllellan et al., Petitioners, vs. John E. Carland, U. S. District Judge, etc. Writ of Certiorari. Filed Dec. 1, 1909. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of John C. McClellan, et al., Petitioners, v. John E. Carland, U. S. District Judge, etc., No. 99 Orig., is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this first day of December, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

26 [Endorsed:] File No. 21,856. Supreme Court U. S. October Term, 1909. Term No. 630. John C. McClellan et al., Petitioners, vs. John E. Carland, U. S. District Judge, etc. Writ of certiorari and return. Filed December 3, 1909.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN ET AL., PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

GRIGSBY AND GRIGSBY,
Counsel for Petitioners.

MELVIN GRIGSBY,
Of Counsel.

(21,856.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, WALTER McCLELLAN, AND EDMUND McCLELLAN, PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

NOTICE OF APPLICATION TO THE SUPREME COURT.

To the Honorable John E. Carland, United States District Judge for the District of South Dakota and holding the Circuit Court in said District:

You are hereby notified, that the above-named petitioners will on Monday, the 11th day of October, 1909, upon their verified petition and a copy of the entire record in this matter, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for writ of certiorari are hereby delivered to you) to the Supreme Court of the United States,

in its court room at the capitol, in the city of Washington, District of Columbia.

GRIGSBY & GRIGSBY,
Attorneys and Counselors for
Petitioners, Sioux Falls, S. D.

Copies of the foregoing notice of application, together with copies of notice of motion, petition for writ of certiorari, brief on application for writ of certiorari and copy of certified record were this day delivered to me by S. K. Grigsby, Esq., at Sioux Falls, South Dakota.

Dated this 27th day of September, A. D. 1909.

JOHN E. CARLAND, *Judge.*

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, WALTER MCCLELLAN, AND EDMUND MCCLELLAN, *Petitioners,*

vs.

JOHN E. CARLAND, *United States District Judge for the District of South Dakota.*

Motion.

Comes now the petitioners, John C. McClellan, James S. McClellan, William S. McClellan, Walter McClellan, and Edmund McClellan, by Grigsby & Grigsby, attorneys and of counsel for said petitioners, and move this Honorable Court that it shall, by certiorari or proper process directed to the Honorable, the judges of the United States Circuit Court of Appeals for the Eighth Circuit, require said court to certify to this court, for its review and determination, a certain cause in said Court of Appeals lately pending, wherein John C. McClellan, James S. McClellan, William S. McClellan, Walter McClellan, and Edmund McClellan were petitioners, and John E. Carland, United States District Judge for the district of South Dakota was respondent, and to that end now tender herewith their petition, with a certified copy of the entire record in said matter in said Circuit Court of Appeals.

GRIGSBY & GRIGSBY,
Attorneys and Counselors for Petitioners,
Sioux Falls, South Dakota.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, WALTER MCCLELLAN, AND EDMUND MCCLELLAN, *Petitioners,*

vs.

JOHN E. CARLAND, *United States District Judge for the District of South Dakota.*

Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent that on the 8th day of September, 1908, they filed their bill in equity in the Circuit Court of the United States for the district of South Dakota, Southern Division, against one George T. Blackman, as special administrator of one John McClellan, deceased, in which bill of complaint is alleged:

First. The citizenship of your petitioners, to-wit: That John C. McClellan is a citizen and resident of Ellis County, in the State of Texas; that James S. McClellan is a citizen and resident of Pulaski County, in the State of Arkansas; that William S. McClellan is a citizen and resident of Teller County, in the State of Colorado; that Walter McClelland and Edmund McClellan are citizens and residents of Allegheny County, in the State of Pennsylvania.

Second. That John McClellan, whose true name was John McClelland, was a citizen and resident of the county of Minnehaha, and State of South Dakota, and that he died, intestate, on or about the 31st day of August, 1899, in the city of Sioux Falls, county of Minnehaha, State of South Dakota, and that said deceased left an estate in the afore-

said county and State consisting of real and personal property of the value at the time of his death of about the sum of thirty-three thousand dollars ($33,000.00).

Third. That thereafter and on or about the 8th day of February, 1900, the county court in and for said county of Minnehaha, and State of South Dakota, after due and regular proceedings therein, made, filed and entered its order and issued letters of administration to one William Van Eps, of said county and State, as administrator of the said estate of said John McClellan, deceased. That said William Van Eps duly qualified as such administrator and did take possession of the said estate and held possession thereof until on or about the 12th day of July, 1906, when the said William Van Eps departed this life.

Fourth. That thereafter such proceedings were had in the said county court in the matter of the said estate, that on or about the 17th day of September, 1906, the said court made, filed, and entered its order and issued letters of special administration to George T. Blackman, a citizen and resident of the State of South Dakota, defendant above named, as special administrator of the said estate, That the said George T. Blackman did then and there qualify as such special administrator and did then and there take possession of the said estate and ever since has been and is now the duly appointed, qualified and acting special administrator of the said estate of said John McClellan, deceased.

Fifth. That the value of the said estate of John McClellan, deceased, situated and located within the State of South Dakota, and now in the possession and control of said George T. Blackman, as special administrator thereof, was on the first day of June, 1907, in excess of the sum of thirty-five thousand dollars ($35,000.00); that the said estate at that time consisted of real estate situated in the city of Sioux Falls, county of Minnehaha, and State of South

Dakota, and farm lands in the county of Davison, State of South Dakota, cash in the hands of the said George T. Blackman, bank stock and certain miscellaneous notes and other personal property.

That since the said first day of June, 1907, the said George T. Blackman, as administrator, has rented, and collected, the rent from certain of the real estate and farming lands belonging to said estate and has deposited certain of the said cash in hand so as to obtain interest thereon for the benefit of said estate.

Sixth. That there are no outstanding claims against the said estate and that all the creditors of the said John McClellan, deceased, have been paid and that the said estate is now ready for distribution thereof according to the statutes of the State of South Dakota in such cases made and provided.

Seventh. That the said John McClellan, deceased, was born in the Parish of Skryne, in the County of Meath, Ireland, on or about the year A. D. Eighteen hundred and Twenty-one (1821), and that thereafter and on or about the 26th day of February, A. D. 1846, the said John McClellan, deceased, was duly and legally married to one Hannah Cruikshank in the Parish Church in said Parish of Skryne, County of Meath, Ireland.

Eighth. That three sons were born of said marriage, two of whom are petitioners John C. McClellan and James S. McClellan. That the third son, William S. McClellan, died on or about the year A. D. 1888, leaving three sons, who are your petitioners William S. McClellan, Walter McClellan and Edmund McClellan.

Ninth. That the petitioners, John C. McClellan and James S. McClellan are sons and the petitioners William S. McClellan, Walter McClellan, and Edmund McClellan are

grandsons of the said John McClellan, deceased, and that your petitioners are the sole surviving heirs-at-law and next of kin of the said deceased, John McClellan, and are lawfully entitled to inherit the estate of the said deceased under and by virtue of the laws and statutes of the said State of South Dakota.

Tenth. Your petitioners in said bill of complaint further alleged that they had no sufficient remedy at law and could only secure relief in a court of equity where such matters are cognizable and reviewable and to the end, that they might obtain the relief to which they were justly entitled and which they can obtain only in a court of equity, they prayed the court to grant them due process by subpœna directed to said George T. Blackman, as special administrator of the estate of John McClellan, deceased, commanding and requiring him to appear and answer, but not under oath, the several allegations in your petitioners' bill of complaint contained.

Eleventh. Your petitioners further in their said bill of complaint, prayed that upon the final hearing it be ordered and decreed that your petitioners John C. McClellan and James S. McClellan are sons and your petitioners William S. McClellan, Walter McClellan, and Edmund McClellan are grandsons of said John McClellan, deceased, and that your petitioners are the sole surviving heirs-at-law and next of kin of said deceased and entitled to inherit the said estate; and that the title in fee to all of the said real estate is in them, the said petitioners, and that it be further ordered and decreed that the said George T. Blackman, special administrator and defendant, render a just and true account of all the moneys and credits, bank stock, rents and interests collected and other personal property now in his hands belonging to the said estate and that, after deducting his lawful fees and expenses lawfully incurred as such ad-

ministrator, he distribute all of the personal property in his hands, as such special administrator, according to the laws of the State of South Dakota, in such cases made and provided, to-wit: To petitioners John C. McClellan and James S. McClellan one-third to each thereof, and to petitioners William S. McClellan, Walter McClellan and Edmund McClellan to each one-ninth thereof, and failing so to do that these petitioners may have judgment against him, the said George T. Blackman, as special administrator, for the total value of all of the said personal property found to be in his hands and under his control:

That pending a determination of their suit the said George T. Blackman, as special administrator aforesaid, be directed and required to hold intact the said estate, and both real and personal property thereof, and that he may be enjoined *pendente lite* from disposing or attempting to dispose of, or from distributing, and from assigning or turning over to any persons whatsoever, the said estate or any part thereof until further order of this court in the premises; and that the court grant such other and further relief herein as may be equitable and just.

That the said bill of complaint was signed and verified.

Your petitioners further respectfully represent that on the 25th day of September, 1908, the said George T. Blackman, defendant in the said suit in the said circuit court, duly made and filed his answer to the said bill of complaint, in which answer the said defendant:

First. Admitted the allegations contained in the first, second, third, and fourth paragraphs of the bill of complaint, which paragraphs of the complaint alleged the death of John McClellan, the value and location of the property left by the deceased, the appointment of himself as administrator and the possession by him of the property as special administrator; and,

Second. Alleged that as to every other allegation, statement and charge in said complaint contained defendant had no knowledge or information sufficient to form a belief and therefore denied the same; and,

Third. Represented to the court that he then held and until the order or judgment of the court to the contrary would continue to hold, the property described in the said bill of complaint to be disposed of agreeably to the judgment or order of the court and disclaimed any interest in or to said property or any part thereof save only in his official capacity as special administrator of the estate of the said John McClellan, deceased.

That on the 28th day of October these petitioners duly made and filed their replication to said answer.

These petitioners further respectfully represented that on the 24th day of November, 1908, the State of South Dakota made application to the said Circuit Court for leave to file a petition in intervention and obtained from said court an order requiring these petitioners and the defendant, George T. Blackman, to show cause before said court why leave should not be granted to the State of South Dakota to intervene as a party in said action or suit which had been begun as aforesaid by these petitioners; that the said order to show cause, omitting the title and formal parts thereof, is in words and figures as follows, to-wit:

"Order on Petition for Intervention.

"The petition of the State of South Dakota for leave to intervene herein, duly verified by S. W. Clark, Attorney General of the State of South Dakota, and by Alpha F. Orr, State's Attorney within and for the county of Minnehaha, in said State of South Dakota, having been presented to the court by U. S. G. Cherry, as special counsel for the said State

of South Dakota, and for the said Attorney General and said State's Attorney, and the same having been fully considered it is:

"Ordered that leave be and the same is hereby granted to file the said petition herein; that the 21st day of December, at the hour of ten o'clock of that day is hereby fixed as the time and the court room of the said court in the Federal Building at the city of Sioux Falls, in the said State, is fixed as the place for hearing upon the said petition; that a copy of said petition and this order be served upon the said petitioners or their said counsel, Grigsby & Grigsby, and upon the said defendant, or his said counsel, Aikens & Judge, at least fifteen (15) days before the date herein fixed for hearing, as aforesaid, and that the said petitioners and that the said defendant show cause, if any they have, before this court at the said time and place herein fixed for such hearing, or as soon thereafter as counsel can be heard, why leave should not be granted to the said State of South Dakota to intervene as a party to this action and why the said petitioners herein should not answer the said petition within such time as may be fixed by the order of the court upon such hearing, and that in case of the failure of the said petitioners so to do, then that the said petition be taken as confessed by the said petitioners and that a decree be entered herein accordingly, and that the said petitioners, at said time and place, further show cause, if any they have, why leave should not be granted to the said State of South Dakota to plead, demur, or reply to the said answer of the said petitioners herein, if such answer shall be made, and to take and have such other proceedings herein as may be granted, ordered and allowed and as may be just and equitable.

"Done at the city of Sioux Falls, in the said District of South Dakota, this 24th day of November, 1909.

"By the court:

"JOHN E. CARLAND, *Judge.*"

That a return to said order to show cause was duly filed on behalf of these petitioners, and the matter of the said order to show cause came on for hearing before said court on the 21st day of December, 1908, and the court having heard arguments for and against the granting of said petition, and having taken the said matter under advisement, on the 4th day of January, 1909, made and entered an order overruling the motion of the said State of South Dakota for leave to intervene, which order overruling said motion is, omitting the formal parts thereof, in words and figures as follows, to-wit:

"The above-entitled cause coming on for hearing before the court, pursuant to the petition filed herein by leave of this court by the State of South Dakota for leave to intervene herein and upon the order to show cause based upon the said petition, returnable herein on the 21st day of December, 1908, S. W. Clark, Attorney General within and for the State of South Dakota, Alpha F. Orr, State's Attorney within and for the county of Minnehaha, and U. S. G. Cherry, as special counsel for the said State of South Dakota, all appearing in behalf of the said State of South Dakota, and Grigsby & Grigsby, solicitors for the petitioners, appearing in opposition to the said petition and order to show cause, and the court having heard the arguments of counsel and being fully advised in the premises, now, on all the proceedings hereinbefore had, it is

"Ordered, that the motion of the said State of South Dakota for leave of intervention herein be and the same is overruled and denied; and it is

"Further ordered, that the further prosecution of this action be and the same is hereby stayed for a period of ninety days from and after December 24, 1908, for the purpose of allowing the State of South Dakota to commence a proper action or proceeding in the proper court to establish its alleged title and interest in and to the said property and estate of the said decedent, and that in the event that such action is com-

menced within this time, then that this action and the prosecution thereof be further stayed until the determination of such action brought by the State of South Dakota, and that in case no such action is commenced by the State of South Dakota within the time herein specified, then that this action shall proceed as equity and justice may require.

"Done at Siouv Falls, South Dakota, this 4th day of January, 1909.

"By the court:

"JOHN E. CARLAND, *Judge.*"

That the written opinion of Judge Carland filed for record in connection with the order overruling the motion for leave to intervene, omitting the title thereof, is as follows:

"On motion for leave to intervene by the State of South Dakota.

"U. S. G. Cherry, Special Counsel.

"S. W. Clark, Attorney General, and Alpha F. Orr, State's Attorney for Minnehaha County, South Dakota, for the State.

'Grigsby & Grigsby, Solicitors for Complainants, in Opposition to motion.

"CARLAND, *District Judge:*

"The motion for leave to intervene has been submitted upon the petition filed in behalf of the State and the return to the order to show cause issued upon the filing of said petition. This action is one in equity brought by complainants to recover certain property now in the possession of the defendant. The sworn petition filed on behalf of the State sets forth that the property in question is the property of the State by reason of the fact that one John McClellan, the former owner thereof, died intestate without heirs. If it were possible for the State in this action to establish the fact

that said property had so devolved to the State the leave to intervene would be granted. It would, however, be an idle proceeding to permit the State to intervene when it appears if it did intervene it could not in this action establish its title by escheat. The petition on file does not show any adjudication of any court vesting the title to said property in the State. No such adjudication can be made until some action is brought by the State to which all the world may be said to be parties and the claim of the State that John McClellan died intestate without heirs established therein.

"It is not necessary to determine the question on this motion as to whether under the laws of South Dakota title vests immediately in the State upon the death of intestate without heirs, or whether an action in the court is necessary to so vest it, as in either event when the State seeks to assert its title it must present some legal evidence of it. Whether the complainants may maintain their action cannot be considered on this motion. This is a proceeding in equity, however, and the court must act accordingly in view of the facts disclosed by the petition. The order will be that the motion to intervene be denied and the prosecution of this action be stayed for the period of ninety days to allow the State to commence a proper action to establish its title. In the event that such action is commenced within such period, this action will be further stayed until the determination of said action brought by the State. If no such action is commenced as herein specified, then this action shall proceed as equity and justice may require.

"(Endorsed:) No. 538. S. D. United States Circuit Court, District of South Dakota. John C. McClellan *et al.*, complainants, *vs.* George T. Blackman, defendant. Memorandum. Filed Dec. 24, 1908. Oliver S. Pendar, clerk, by Odin R. Davis, deputy."

That upon the 18th day of March, 1909, the said Circuit Court, in pursuance of the order heretofore set out, which

order overruled the motion for intervention and stayed further proceedings, and upon a showing made by affidavit that the State had begun an action to escheat, made a further order staying proceedings of the said suit brought in said Circuit Court by these petitioners, which further order, omitting the title, is in words and figures as follows, to-wit:

"On the affidavit of George J. Danforth, State's Attorney within and for the county of Minnehaha and State of South Dakota, and on all the files, pleadings and proceedings hereinbefore had, and on application of said Danforth as State's Attorney within and for the said county and S. W. Clark, Attorney General within and for said State of South Dakota, and U. S. G. Cherry, as special counsel for said State's Attorney and Attorney General,

"It is hereby ordered, that the further prosecution of the above-entitled action by the said complainants be and the same is hereby stayed until the determination of that certain action now pending in the Circuit Court within and for the county of Minnehaha in the State of South Dakota, wherein the State of South Dakota is complainant and Edward J. Taber and other persons therein designated by name are defendants, and all persons unknown having or claiming to have any right, title or interest in or to the estate of the said John McClellan, deceased, are also defendants, has been determined or until the further order of the court herein.

"Done at Sioux Falls, South Dakota, this 18th day of March, 1909.

"JOHN E. CARLAND, *Judge*."

That thereafter and on the 29th day of March, 1909, these petitioners made application to the said Circuit Court and procured an order upon the State of South Dakota and the Attorney General thereof to show cause before the said Circuit Court why the said orders staying proceedings should not be set aside and vacated and why the suit of these petitioners should not proceed immediately to a speedy hearing

and determination of the same, which order so obtained, omitting the title, is as follows, to-wit:

"*To the State of South Dakota and Attorney General thereof and the County of Minnehaha and State's Attorney thereof:*

"You will please take notice: that upon consideration of the annexed affidavit and petition of Melvin Grigsby, the court being duly advised in the premises and reason therefor appearing, it is hereby

"Ordered, that you and each of you show cause before this court, at the United States Postoffice Building, in the city of Sioux Falls, county of Minnehaha and State of South Dakota, on the 12th day of April, 1909, at ten o'clock a. m. of that day, why the orders of this court staying proceedings herein, dated respectively January 4, 1909, and March 18, 1909, should not be vacated and set aside and why this suit should not proceed immediately to a speedy hearing and determination of the same, according to the statutes of the United States and rules of this court; that a copy of this order and the said affidavit and petition of said Melvin Grigsby be forthwith served upon George J. Danforth, State's Attorney within and for said county and State.

"Dated this 29th day of March, 1909.

"By the court:

"JOHN E. CARLAND, *Judge.*"

That return to the said order to show cause was duly made by the Attorney General and the matter coming on for hearing before the said Circuit Court on the 14th day of April, 1909, and having been duly considered the court entered an order overruling the application contained in the said order to show cause, which order so overruling the said application, omitting the title, is as follows, to-wit:

"The order to show cause, returnable on the 12th day of April, 1909, and adjourned by consent to the date hereof,

why the order made by this court staying proceedings herein, dated respectively January 4, 1909, and March 18, 1909, should not be vacated and set aside, and why this suit should not proceed immediately to a speedy hearing and determination of the same, coming on regularly for hearing at the court room in the Federal Building in the city of Sioux Falls, in the said district, Grigsby & Grigsby appearing in support of the same and S. W. Clark, George J. Danforth, and U. S. G. Cherry appearing in opposition thereto, and the court having heard the arguments of counsel and being fully advised in the premises and having considered the matter, it is hereby ordered:

"That the application contained in the said order to show cause be, and the same hereby is, in all things overruled and denied.

"Dated at Sioux Falls, South Dakota, this 14th day of April, 1909.

"By the court:

"JOHN E. CARLAND, *Judge.*"

That thereafter and on the 22d day of April, 1909, your petitioners applied to the United States Circuit Court of Appeals for the Eighth Circuit for a writ of mandamus commanding Judge John E. Carland to vacate his said order staying proceedings in the Circuit Court for his district, and in their petition to the said Circuit Court of Appeals your petitioners, after setting out all of the proceedings had before Judge Carland in the Circuit Court substantially as hereinbefore stated, concluded as follows:

"Your petitioners further allege that the said orders staying proceedings, Exhibit "E" and Exhibit "F," have never been vacated or set aside; that the said order, Exhibit "H," refusing to vacate and set aside the said orders staying proceedings has never been vacated or set aside. That said orders were made by the said Circuit Court arbitrarily and unlawfully and in violation of the right which your peti-

tioners have under the Constitution and laws of the United States to have their said action in the Circuit Court tried by the said court in the ordinary course of procedure, and that your petitioners have no remedy by appeal or writ of error to review the said orders.

"Wherefore your petitioners pray that this court issue to the Honorable John E. Carland, District Judge of the United States for the District of South Dakota and holding the Circuit Court in said district, a writ of mandamus, commanding him to vacate and set aside said orders staying proceedings in said action and to proceed to try and determine said action in the usual course of procedure without regard to the pendency of the proceeding, hereinbefore alleged, now pending in the courts of the State of South Dakota."

That the said petition for writ of mandamus was heard by the United States Circuit Court of Appeals and denied, and that the order denying said application and dismissing the petition for writ of mandamus is shown by the following certified copy of the record thereof in said court:

"UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, DECEMBER TERM, 1908.

"No. 99, Original.

"THURSDAY, *April* 22, 1909.

"JOHN C. MCCLELLAN ET AL., *Petitioners,*

vs.

"JOHN E. CARLAND, *United States District Judge for the District of South Dakota.*

"On Petition for Writ of Mandamus.

"This cause came on this day to be heard upon the original petition (or information) for a writ of mandamus, and was argued by Mr. Melvin Grigsby, of counsel for petitioners.

"On consideration whereof, the court being fully advised in the premises, it is now here ordered and adjudged that said petition for a writ of mandamus herein be, and the same is hereby, denied; and that the petition for such writ be, and the same is hereby, dismissed at the costs of the petitioners, except that no attorney's fee shall be taxed in favor of the respondent.

"April 22, 1909.

"UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

"I John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the judgment dismissing the petition for writ of mandamus in the case of John C. McClellan *et al.*, Petitioners, *vs.* John E. Carland, United States District Judge for the District of South Dakota, No. 99, Original, as full, true and complete as same remains on file and of record in my office.

"In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office, in the city of St. Louis, Missouri, this 10th day of May, A. D. 1909.

"[SEAL.] JOHN D. JORDAN,
"Clerk of the United States Circuit Court of Appeals."

Your petitioners have no right of appeal or writ of error herein to this Honorable Court, because the jurisdiction of the Circuit Court depended entirely on diverse citizenship.

The order staying proceedings in the Circuit Court and the order of the Circuit Court of Appeals refusing the relief there prayed for are in effect final orders or decisions.

If these petitioners are compelled to await the final decision of the State court, which involves the same subject-

matter of the suit of your petitioners in the Circuit Court of the United States, they are virtually denied their rights under the Constitution to have their cause determined in the United States Circuit Court, because if the final decision of the action in the State court in which your petitioners have been made defendants should be adverse to them, the judgment therein would be a bar to further proceedings in their suit in the United States Circuit Court; if the final decision in the State court should be in their favor there would then be no necessity for further proceedings in the United States Circuit Court.

While this cause may not be considered of great importance from the standpoint of the amount involved, which is in excess of thirty-five thousand dollars ($35,000.00), the principle involved is of the gravest importance, because the contention of your petitioners is that they have been deprived of rights guaranteed to them by section two (2) of article three (3) of the Constitution of the United States.

Your petitioners present herewith as part of this petition a brief showing more fully their views upon the questions involved, and also a transcript of the record in the Circuit Court of Appeals.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled John C. McClellan *et al.*, Petitioners, *vs.* John E. Carland, United States District Judge for the District of South Dakota, No. 99, Original, to the end that the said case may be reviewed and determined by this court as provided in section six (6) of the act of Congress entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts

of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray.

JOHN C. MCCLELLAN,
JAMES S. MCCLELLAN,
WILLIAM S. MCCLELLAN,
WALTER MCCLELLAN,
EDMUND MCCLELLAN,
Petitioners,

By GRIGSBY & GRIGSBY,
Their Counsel.

MELVIN GRIGSBY,
Of Counsel.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Melvin Grigsby, being duly sworn, says that he is one of the counsel for the petitioners above named; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 27th day of September, 1909.

[SEAL.] GEO. T. BLACKMAN,
Notary Public, South Dakota.

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one and is such that the prayer of the petition should be granted by this Honorable Court.

MELVIN GRIGSBY.

[Endorsed:] Supreme Court of the United States, October term, A. D. 1909. John C. McClellan *et al.*, petitioners, *vs.* John E. Carland, United States District Judge for the District of South Dakota.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, ET AL., PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GRIGSBY AND GRIGSBY,
Counsel for Petitioners.

MELVIN GRIGSBY,
Of Counsel.

(21,856.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

IN RE JOHN C. McCLELLAN ET AL.

vs.

GEORGE T. BLACKMAN.

BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

These petitioners in presenting their application to the United States Circuit Court of Appeals for a writ of mandamus relied mainly upon the case of Barber Asphalt Paving Company against Judge Morris, decided by the same court in 1904.

132 Fed., 945.

In that case the complainants, as in this, brought suit in the United States Circuit Court claiming jurisdiction of the court on the grounds of diversity of citizenship.

In the case of the Asphalt Paving Company against Morris the circuit court granted a stay of proceedings on the grounds that actions were pending in the State court involving the same subject-matter as that of the case brought in the circuit court.

It was not claimed in that case and is not claimed in this that the circuit court did not have jurisdiction of the suit.

The only difference between that case and the one at bar is that in that case the court granted a stay of proceedings because there were other actions pending in the State courts involving the same subject-matter, and the stay was granted to await the determination of those actions, while in this case the stay of proceedings was granted to allow the State of South Dakota 90 days within which to begin an action in a proper court to establish its title to the property in question, and if such action was brought within that time then the suit in the circuit court was to be stayed to await the result of such action.

We have not been able to find precedent for the ruling of the circuit court in this case. We take it, however, that there can be no difference in principle between staying proceedings to await the result of actions already begun and staying proceedings to permit an action to be begun, and that if authority could be found sustaining one of these positions it would also sustain the other.

In the opinion in Barber Asphalt Paving Company against Morris, delivered by the learned Judge Sanborn, it was said:

"It is, however, earnestly argued that the order of the court below constituted neither a bar nor an abatement of the action before it, but that it was a mere discretionary order staying proceedings for a definite time, and hence not subject to challenge upon an application for a writ of mandamus. The answer is that it stayed proceedings until they would in all probability be futile, until the petitioner would probably be estopped by the final judgments of other courts from any hearing or trial of its controversy upon the merits in the courts of the nation."

Insurance Co. *vs.* Harris, 97 U. S., 331, 336, 338; 24 L. Ed., 959.

"The reason for the rule that the pendency of an action in a State court is no bar and furnishes no ground for the abatement of another action for the same cause between citi-

zens of different States in the Federal court is that the latter court has concurrent jurisdiction of such controversies with the courts of the State, and that citizens of different States have the constitutional right to the independent opinion and judgment of the judges of the national courts upon the questions presented by their controversies at least until those questions have become *res adjudicata* by the judgments of other competent courts. Orders that such citizens shall secure no such opinions until they are conclusively estopped from obtaining them by the final judgments of other courts upon their controversies as effectually deprive them of their rights to adjudications in the national courts as judgments sustaining pleas in bar or in abatement. Nay, they deprive them of those rights more effectually, because such judgments are reviewable by appeal or by writ of error, while such stays may not be so challenged. The power is granted to the judges of the circuit court and the duty is imposed upon them by the Constitution and the acts of Congress to form and express their independent opinions upon controversies between citizens of different States over which the jurisdiction of their courts is properly invoked. However grateful to them and courteous to others it would be in cases of concurrent jurisdiction to await the opinions of the respected and able jurists who adorn the benches of the courts of the States, and then to be bound by their decisions, that power may not be lawfully abdicated, nor may that duty be legally renounced, by the judges of the Federal courts. The order staying proceedings in the action in the circuit court until the final determination of the appeals in the State courts is violative of these principles, calculated to deprive the petitioner of its right to the independent decision of the Federal court upon the question involved in its controversy, and it cannot be sustained."

The same reasoning will apply in this case, unless there is a difference between the two cases arising out of the fact that in one case the opposing party in the State court was one of the cities of the State, while in the other the State itself was claiming an interest in the subject-matter of the suit.

The Circuit Court of Appeals in denying the writ of mandamus in this case did not render an opinion in writing,

but orally stated, to the best recollection of the attorneys for your petitioners, that the rule established by the decision in Barber Asphalt Paving Company did not apply, because in the matter presented to them it appeared that in the suit of your petitioners against George T. Blackman, as administrator, the State of South Dakota had formally appeared and claimed title to the property in question, and that therefore the circuit court could not proceed without making the State a party, and that to make the State a party would oust the jurisdiction of the court under the Eleventh Amendment to the Constitution of the United States.

The court also stated that they were controlled by the decisions in—

State of Minnesota *vs.* The Northern Securities Co., 184 U. S., 200, and

California *vs.* Southern Pacific Company, 157 U. S., 229,

and referred particularly to the following portion of the opinion of Judge Shiras in the Northern Securities case:

"The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel.

"Shields *vs.* Barrow, 17 How., 130; 15 L. Ed., 158.

"Hipp *vs.* Babin, 19 How., 271-278; 15 L. Ed., 633-635.

"Parker *vs.* Winnipiseogee Lake Cotton & Woolen Co., 2 Black., 545; 17 L. Ed., 333."

In both the Securities Company case and that of the Southern Pacific Company this court held that the complaints disclosed that the relief could not be granted as prayed for without affecting the rights of others not parties to the suits.

In the case at bar there is nothing in the bill of complaint of your petitioners in the circuit court from which it can be gathered that the State or any party, except only the petitioners and the defendant, had any interest whatever in the subject-matter of the suit, unless it can be claimed that in every case wherein heirs seek to establish title to the property of a decedent the State is a necessary party, or can claim the right of intervention on the ground that the property of all decedents escheats to the State in default of legitimate heirs.

The State of South Dakota petitioned the circuit court for leave to intervene, claiming to be the owner of the property in question, because the same had escheated to the State, making a case almost exactly in line with—

United States *vs.* Judge Peters, 5th Cranch, 115,

wherein Chief Justice Marshall, writing the opinion, said:

"It is contended that the Federal courts were deprived of jurisdiction, in this cause, by that amendment of the Constitution which exempts States from being sued in those courts by individuals. This amendment declares, 'that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

"The right of the State to assert, as plaintiff, any interest it may have in a subject, which forms the matter in controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a State. The State cannot be a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. In this case, the suit was not instituted against the State or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds

had been the actual property of Pennsylvania, however, wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State of property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title."

The State of South Carolina *vs.* Edward B. Wesley, 155 U. S., 543; 39 L. Ed., 254, is almost identical in principle with the case here presented.

In that case the action was brought by a citizen of the State of New York *vs.* citizens of the State of South Carolina to recover possession of certain real estate. The defendant denied the allegations of the complaint, and as a second defense claimed that he was in possession of the property as the secretary of state of the State of South Carolina, disclaiming any individual right, title, or interest in the property. Before the trial came off the Attorney General appeared on behalf of the State and suggested to the court and gave it to understand and be informed that the property in controversy was in the possession of and belonged to the State, and insisted that on that account the court had not jurisdiction of the subject in controversy, and moved that the complaint be set aside and all proceedings dismissed.

The circuit court overruled the motion to dismiss, and a writ of error having been allowed, this court sustained the ruling of the lower court and cited:

United States *vs.* Peters, 9 U. S., Cranch, 115 (3:53).

The Exchange *vs.* McFadden, 11 U. S., 7 Cranch, 116 (3:287).

Osborn *vs.* Bank of United States, 22 U. S., 9 Wheat., 738 (6:204).

United States *vs.* Lee, 106 U. S., 196 (27:171).

Stanley *vs.* Schwalby, 147 U. S., 508 (37:259).

Again in—

Tindal *vs.* Wesley, 167 U. S., 203-206; 42 L. C. P., 137,

which seems to be the leading case on this subject, and a branch of the case last above cited, this court again reviewed many prior decisions, referring to the case of United States *vs.* Lee as the leading case on the subject, and in the opinion said:

"We now repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this court in United States *vs.* Peters:

" 'It certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the subject and examining the validity of the title.' "

The fundamental error in the reasoning of the Circuit Court of Appeals seems to have been in holding that a decision in favor of the plaintiffs in the court below would be binding upon the State of South Dakota.

That such would not have been the case has been repeatedly decided by this court. For instance, in—

Tindal *vs.* Wesley,

supra, in the opinion written by Judge Harlan, it was said:

"It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its right to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

The same doctrine was laid down in—

United States *vs.* Lee, 16 Otto, 196-251; 27 L. C. P., 171, and in—

Carr *vs.* United States, 98 U. S., 433; 25 L. C. P., 209.

In the last above cited case the point was directly raised as to whether a judgment against a defendant who claimed title under the United States could be set up by way of estoppel in an action brought by the United States to quiet title to the same land.

It was held that such judgment was no estoppel, even though in the former action the United States district attorney for the district, and other counsel employed by the Secretary of the Treasury, attended at the trial on behalf of the defendant.

It would seem that if the ruling of the honorable judge of the circuit court in staying proceedings and the decisions of the learned judges of the Circuit Court of Appeals in refusing the writ of mandamus were correct, it would follow that article 3 of section 2 of the Constitution of the United States, which provides that "the judicial power shall extend to all cases * * * between citizens of different States," should be followed by a proviso stating that if in any action brought by citizens of one State against citizens of another States to determine property rights a State should come into court and claim to be the owner of the property involved in the action, then in such event such action should be dismissed.

"As to Jurisdiction of the Circuit Court."

That the circuit court had jurisdiction of the suit of John McClellan *et al. vs.* George T. Blackman, as administrator,

seems to have been settled beyond all controversy by this court in—

Payne *vs.* Hook, 7 Wall., 425; 19 L. Ed., 260.

Byers *vs.* McAuley, 149 U. S., 608; 37 L. Ed., 867, and cases cited in the later case of—

Ingersoll *vs.* Coram, Advance Sheets U. S. Supreme Court, January 15th, 1909.

Respectfully submitted,

GRIGSBY & GRIGSBY,
Counsel for Petitioners.

MELVIN GRIGSBY,
Of Counsel.

[Endorsed:] Supreme Court of the United States, October term, A. D. 1909. John C. McClellan *et al.*, petitioners, *vs.* John E. Carland, United States district judge for the district of South Dakota.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, WALTER McCLELLAN, AND EDMUND McCLELLAN, PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

NOTICE OF MOTION.

To the Honorable John E. Carland, United States District Judge for the District of South Dakota:

You will please take notice that on Monday, the 3d day of January, A. D. 1910, at the opening of the court on that day, or as soon thereafter as counsel may be heard, the above-named petitioners will submit a motion (a copy of which is herewith delivered to you) to the Supreme Court of the United States, in its court-room at the Capitol, in the city of Washington, D. C.

GRIGSBY & GRIGSBY,
Attorneys for Petitioners.

MELVIN GRIGSBY,
Of Counsel.

A copy of the foregoing notice, together with a copy of said motion, were this day delivered to me by S. K. Grigsby, Esq., at Sioux Falls, South Dakota.

Dated this 10th day of December, A. D. 1909.

JOHN E. CARLAND, *Judge.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 630.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, WALTER MCCLELLAN, and EDMUND MCCLELLAN, *Petitioners*,

vs.

JOHN E. CARLAND, *United States District Judge for the District of South Dakota.*

MOTION TO ADVANCE.

Comes now the above-named petitioners, by Melvin Grigsby, Esq., their counsel, and upon the record and proceedings herein and the following statement of facts and reasons for the application now move this honorable court that the said matter and hearing thereof, upon writ of certiorari issued to the Circuit Court of Appeals of the Eighth Circuit on November 16, 1909, be advanced upon the calendar of the court for argument, submission, and determination.

Statement of Facts.

These petitioners make a part of the statement of facts on which this motion is made, and herewith refer to, the printed transcript of record on file in this matter, and further state as follows:

That on the 8th day of September, 1908, the petitioners, claiming to be heirs-at-law and next of kin of John McClellan, deceased, filed a bill of complaint in the Circuit Court of the United States for the District of South Dakota against one George T. Blackman, as special administrator

of the estate of said deceased, wherein petitioners prayed for a decree in substance adjudging them to be entitled to inherit the said estate; that the fee title of all real estate thereof be decreed to be in them, and that such special administrator account to them for all personal property (Exhibit "A," Transcript of Record, page 4).

That thereafter the said defendant filed his answer to the bill aforesaid, and in effect a general denial thereof (Exhibit "B," Transcript of Record, page 8), to which answer petitioners filed a replication in the usual form (Exhibit "C," Transcript of Record, page 9).

That thereafter, on the 24th day of November, 1908, the State of South Dakota filed a petition in said suit for leave to intervene therein, alleging in said petition in substance that the said deceased had died without heirs-at-law or next of kin and that the said estate had escheated to the State of South Dakota, and that said State of South Dakota was entitled to the possession of the same and of the whole thereof. Upon which petition the said circuit court issued an order directed to the parties to said suit and requiring them to show cause on the 21st day of December, 1908, why leave should not be granted to the said State of South Dakota to intervene as a party thereto (Exhibit "D," Transcript of Record, page 10).

That said order to show cause came on to be heard on said December 21, 1908, and on the 4th day of January, 1909, an order was duly made and entered by the court overruling and denying the said petition of the State of South Dakota for leave to intervene, and further holding and ordering that the further prosecution of the suit brought by these petitioners aforesaid be stayed for a period of ninety (90) days for the purpose of allowing the said State of South Dakota to commence a proper action or proceeding in a proper court to establish its alleged title and interest in and to the said estate, and that in the event that such action be commenced within that time, then that the suit

brought by petitioners be further stayed until the determination of such action brought by the State of South Dakota (Exhibit "E," Transcript of Record, page 11).

That thereafter, on March 11, 1909, the Attorney General of said State of South Dakota and the State's attorney of Minnehaha county, South Dakota, commenced an action in the Circuit Court of the Second Judicial Circuit in and for said county and State, in which action the State of South Dakota is complainant and these petitioners and the said George T. Blackman, as special administrator aforesaid, and other persons are defendants, which action is now pending in said court, and in the complaint in said action said State of South Dakota alleges among other things that said decedent died without issue and without heirs-at-law or next of kin, and that the said estate at his death devolved and escheated to the State of South Dakota, and that by reason thereof the said State of South Dakota has a right by law to said estate and the whole thereof, and said complainant prays for judgment that the title and ownership of all the property belonging to the said estate be determined and quieted in said State of South Dakota against these petitioners and the other defendants, and that it be let into possession of said estate, and that the said special administrator be ordered and directed to pay over and deliver to the officers of the said State of South Dakota, for its benefit, all personal property belonging to the said estate, and for other and further relief accordingly.

That thereafter, upon the affidavit of the State's attorney of said Minnehaha county stating that said action had been commenced in the Circuit Court of the Second Judicial Circuit aforesaid, the said Circuit Court of the United States on the 18th day of March, 1909, made and entered a further order in the suit brought by these petitioners against said special administrator, as aforesaid, staying all proceedings therein until the final determination of that certain action brought and pending in the State court aforesaid by the

State of South Dakota (Exhibit "F," Transcript of Record, page 12).

That thereafter on the 29th day of March, 1909, these petitioners applied to said Circuit Court of the United States for an order directed to said State of South Dakota and said Attorney General and State's Attorney thereof requiring them to show cause why the orders of said Circuit Court of the United States dated, respectively, January 4th and March 18th, 1909, aforesaid, should not be vacated and set aside and why the suit of these petitioners in said United States Circuit Court should not proceed to a speedy hearing and determination, which order to show cause was granted by said United States Circuit Court and made returnable on the 12th day of April, 1909 (Exhibit "G," Transcript of Record, page 13).

That on said 12th day of April, 1909, said order to show cause came on to be heard before said United States Circuit Court and was by said court in all things overruled and denied (Exhibit "H," Transcript of Record, page 14).

That thereafter and on April 22, 1909, these petitioners made application to the United States Circuit Court of Appeals for the Eighth Circuit for a writ of mandamus directing the Circuit Court of the United States for the Southern Division of the District of South Dakota to vacate and set aside the aforesaid order staying proceedings and to try and determine the suit of these petitioners in the usual course of procedure, which petition for a writ of mandamus was overruled and denied by said Circuit Court of Appeals on said day (Transcript of Record, page 15).

That thereafter on November 16, 1909, the Supreme Court of the United States issued its writ of certiorari herein commanding said Circuit Court of Appeals to certify without delay the record and proceedings in said cause so that the said Supreme Court might review the orders aforesaid and act accordingly.

These petitioners further state that they have appeared

in said Circuit Court of the Second Judicial Circuit in and for the county of Minnehaha and State of South Dakota, in the said action of escheat brought by the said State of South Dakota against petitioners, and others, as defendants, and said action not being removable to the courts of the United States under existing laws, by reason of the State of South Dakota being complainant therein, these petitioners have made and filed their answers to the complaint of said State of South Dakota and in said answers have denied that said estate has escheated and have further in said answers set out as a defense to said complaint substantially the same facts as set out by them in their suit brought in said Circuit Court of the United States against the said special administrator of said estate. That a plea of abatement to the said complaint of the State of South Dakota, based on the pendency of such suit brought in said Circuit Court of the United States, was not available to these petitioners by reason of the aforesaid restraining orders of said Circuit Court of the United States. That said action brought by the State of South Dakota in the State court aforesaid is now at issue and is upon the November, 1909, calendar of the said State court for trial and that the Attorney General of said State and the State's attorney of said county are insisting before said court that the same be speedily tried and determined and that although these petitioners have moved said court for a continuance thereof that such motion has not yet been ruled upon by said court and if overruled and denied these petitioners will be compelled to go to trial in said action when the same is reached in the ordinary course of the business of said court, unless a restraining order should be granted by this court or some member thereof.

From the foregoing statement of facts these petitioners affirm and allege that there are manifest reasons why the hearing upon said writ of certiorari should be advanced upon the calendar of this court, as follows:

Reasons for the Application.

That unless a hearing is speedily had upon said writ of certiorari these petitioners may during the pendency thereof be forced to a trial of the said action brought by the State of South Dakota and now pending in the Circuit Court of the Second Judicial Circuit in and for the county of Minnehaha, within said State, in which case the decision of this court upon said writ of certiorari, even if the same were favorable to the petitioners, would be fruitless and afford petitioners no relief for the reason that they would in the meantime have been deprived of their lawful right and privilege, as citizens of various States of the United States, of having their said suit, previously commenced and previously at issue in the United States Circuit Court aforesaid, speedily tried and determined.

Dated at Sioux Falls, S. D., this 10th day of December, A. D. 1909.

JOHN C. MCCLELLAN,
JAMES S. MCCLELLAN,
WILLIAM S. MCCLELLAN,
WALTER MCCLELLAN,
EDMUND MCCLELLAN,
Petitioners,

By GRIGSBY & GRIGSBY,
Attorneys.

MELVIN GRIGSBY,
Of Counsel.

[Endorsed:] Supreme Court of the United States. October term, A. D. 1909. No. 630. 21,856. John C. McClellan *et al.*, petitioners, *vs.* John E. Carland, United States District Judge, District of South Dakota. Motion to advance cause on calendar. Grigsby & Grigsby, Attorneys. Melvin Grigsby, of Counsel.

[Endorsed:] File No. 21,856. Supreme Court U. S. October term, 1909. Term No. 630. John C. McClellan *et al.*, petitioners, *vs.* John E. Carland, U. S. District Judge, etc. Motion to advance, notice and proof of service. Filed December 13, 1909.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, WALTER McCLELLAN, AND EDMUND McCLELLAN, PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF FOR PETITIONERS.

Statement of the Case.

On the 8th day of September, 1908, the petitioners filed their bill in equity in the Circuit Court of the United States for the District of South Dakota, Southern Division, against one George T. Blackman, as special administrator of one John McClellan, deceased.

In their bill of complaint it is alleged:

That John C. McClellan is a citizen and resident of Ellis County, in the State of Texas; that James S. McClellan is a citizen and resident of Pulaski County, in the State of Arkansas; that William S. McClellan is a citizen and resident of Teller County, in the State of Colorado; that Walter McClellan and Edmund McClellan are citizens and residents of Allegheny County, in the State of Pennsylvania.

That one John McClellan was a citizen and resident of the county of Minnehaha, and State of South Dakota, and that he died, intestate, on or about the 31st day of August, 1899, in the city of Sioux Falls, county of Minnehaha, State of South Dakota, and that he left an estate in the aforesaid county and State consisting of real and personal property of the value at the time of his death of about the sum of thirty-three thousand dollars ($33,000.00).

That the defendant, George T. Blackman, is a citizen and resident of the county of Minnehaha, and State of South Dakota, and the duly appointed administrator of the estate of the said John McClellan, deceased.

That the value of the said estate of John McClellan, deceased, was at the time of the filing of said bill of complaint in excess of the sum of thirty-five thousand dollars ($35,000.00); that all of the creditors of the said John McClellan, deceased, have been paid; that there were no outstanding claims against the said estate, and that the said estate was then ready for distribution according to the statutes of the State of South Dakota in such cases made and provided.

That the complainants were the only surviving heirs-at-law and next of kin of the deceased John McClellan, and were lawfully entitled to inherit the estate of the said deceased.

That the complainants had no sufficient remedy at law and could only secure relief in a court of equity, and they prayed that upon the final hearing it be ordered and decreed that your petitioners John C. McClellan and James S. McClellan are sons and your petitioners William S. McClellan, Walter McClellan, and Edmund McClellan are grandsons of said John McClellan, deceased, and that your petitioners are the sole surviving heirs-at-law and next of kin of said deceased and entitled to inherit the said estate; and that the title in fee to all of the said real estate is in them, the said petitioners, and that it be further ordered and decreed that the said George T. Blackman, special administrator

and defendant, render a just and true account of all the moneys and credits, bank stock, rents and interests collected and other personal property now in his hands belonging to the said estate and that, after deducting his lawful fees and expenses lawfully incurred as such administrator, he distribute all of the personal property in his hands, as such special administrator, according to the laws of the State of South Dakota, in such cases made and provided, to-wit: To petitioners John C. McClellan and James S. McClellan one-third to each thereof, and to petitioners William S. McClellan, Walter McClellan and Edmund McClellan to each one-ninth thereof, and failing so to do that these petitioners may have judgment against him, the said George T. Blackman, as special administrator, for the total value of all of the said personal property found to be in his hands and under his control.

On the 25th day of September, 1908, the said George T. Blackman, defendant in the said suit, duly made and filed his answer to the said bill of complaint, in which answer the said defendant—

Admitted the allegations of the complaint in regard to the death of John McClellan, the value and location of the property left by the deceased, the appointment of himself as the administrator, and the possession by him of the property as special administrator; and,

Alleged that as to every other allegation, statement and charge in said complaint contained, he, the defendant, had no knowledge or information sufficient to form a belief, and therefore denied the same; and, further,

Represented to the court that he disclaimed any interest in the said property, save only in his official capacity as special administrator of the estate of the said John McClellan, deceased.

On the 28th of October, 1908, these petitioners, the complainants in the court below, filed their replication to said answer.

The said bill of complaint, the answer thereto, and the replication are fully set out in the certified record from the Circuit Court of Appeals, from the eighth circuit, on pages 4 to 9 thereof, which is now on file in this court.

That thereafter, and on the 24th day of November, 1908, the State of South Dakota, represented by the Attorney-General of said State, and the county attorney of the said county of Minnehaha, made application to the said Circuit Court for leave to file a petition in intervention, in which petition they allege that the complainants, the petitioners herein, were not the heirs and next of kin of the said John McClellan, deceased; that there were no known heirs of the said deceased John McClellan, and that by reason thereof the said estate had escheated to the State of South Dakota, and they obtained an order from the said Circuit Court requiring the complainants to show cause why the said State of South Dakota should not be allowed to intervene and be made a party in said suit.

That a return to the said order to show cause was duly filed by the complainants, and came on for hearing before said court on the 21st day of December, 1908, and the court, having heard arguments, took the matter under advisement, and on the 4th day of January, 1909, made and filed on order overruling the motion made on the part of the State of South Dakota for leave to intervene, which order overruling said motion, omitting the formal parts thereof, is in words and figures as follows:

> "The above-entitled cause coming on for hearing before the court, pursuant to the petition filed herein by leave of this court by the State of South Dakota for leave to intervene herein and upon the order to show cause based upon the said petition, returnable herein on the 21st day of December, 1908, S. W. Clark, attorney general within and for the State of South Dakota, Alpha F. Orr, State's attorney within and for the county of Minnehaha, and U. S. G. Cherry, as special counsel for the said State of South Dakota, all appearing in behalf of the said State of

South Dakota, and Grigsby & Grigsby, solicitors for the petitioners, appearing in opposition to the said petition and order to show cause, and the court having heard the arguments of counsel and being fully advised in the premises, now, on all the proceedings hereinbefore had, it is

"Ordered, that the motion of the said State of South Dakota for leave of intervention herein be and the same is overruled and denied; and it is

"Further ordered, that the further prosecution of this action be and the same is hereby stayed for a period of ninety days from and after December 24, 1908, for the purpose of allowing the State of South Dakota to commence a proper action or proceeding in the proper court to establish its alleged title and interest in and to the said property and estate of the said decedent, and that in the event that such action is commenced within this time, then that this action and the prosecution thereof be further stayed until the determination of such action brought by the State of South Dakota, and that in case no such action is commenced by the State of South Dakota within the time herein specified, then that this action shall proceed as equity and justice may require.

"Done at Sioux Falls, South Dakota, this 4th day of January, 1909.

"By the court:

"JOHN E. CARLAND, *Judge.*"

That the written opinion of Judge Carland filed for record in connection with the order overruling the motion for leave to intervene, omitting the title thereof, is as follows:

"On motion for leave to intervene by the State of South Dakota.

"U. S. G. Cherry, special counsel.

"S. W. Clark, attorney general, and Alpha F. Orr, State's attorney for Minnehaha county, South Dakota, for the State.

"Grigsby & Grigsby, solicitors for complainants, in opposition to motion.

"CARLAND, *District Judge:*

"The motion for leave to intervene has been submitted upon the petition filed in behalf of the State and the return to the order to show cause issued upon the filing of said petition. This action is one in equity brought by complainants to recover certain property now in the possession of the defendant. The sworn petition filed on behalf of the State sets forth that the property in question is the property of the State by reason of the fact that one John McClellan, the former owner thereof, died intestate without heirs. If it were possible for the State in this action to establish the fact that said property had so devolved to the State the leave to intervene would be granted. It would, however, be an idle proceeding to permit the State to intervene when it appears if it did intervene it could not in this action establish its title by escheat. The petition on file does not show any adjudication of any court vesting the title to said property in the State. No such adjudication can be made until some action is brought by the State to which all the world may be said to be parties and the claim of the State that John McClellan died intestate without heirs established therein.

"It is not necessary to determine the question on this motion as to whether under the laws of South Dakota title vests immediately in the State upon the death of intestate without heirs, or whether an action in the court is necessary to so vest it, as in either event when the State seeks to assert its title it must present some legal evidence of it. Whether the complainants may maintain their action cannot be considered on this motion. This is a proceeding in equity, however, and the court must act accordingly in view of the facts disclosed by the petition. The order will be that the motion to intervene be denied and the prosecution of this action be stayed for the period of ninety days to allow the State to commence a proper action to establish its title. In the event that such action is commenced within such period, this action will be further stayed until the determination of said action brought by the State. If no such ac-

tion is commenced as herein specified, then this action shall proceed as equity and justice may require.

"(Endorsed:) No. 538. S. D. United States Circuit Court, District of South Dakota. John C. McClellan *et al.*, complainants, *vs.* George T. Blackman, defendant. Memorandum. Filed Dec. 24, 1908. Oliver S. Pender, clerk, by Odin R. Davis, deputy."

That upon the 18th day of March, 1909, the said Circuit Court, in pursuance of the order heretofore set out, which order overruled the motion for intervention and stayed further proceedings, and upon a showing made by affidavit that the State had begun an action to escheat, made a further order staying proceedings of the said suit brought in said Circuit Court by these petitioners, which further order, omitting the title, is in words and figures as follows, to-wit:

"On the affidavit of George J. Danforth, State's attorney within and for the county of Minnehaha and State of South Dakota, and on all the files, pleadings and proceedings hereinbefore had, and on application of said Danforth as State's attorney within and for the said county, and S. W. Clark, attorney general within and for said State of South Dakota, and U. S. G. Cherry, as special counsel for said State's attorney and attorney general,

"It is hereby ordered, that the further prosecution of the above-entitled action by the said complainants be and the same is hereby stayed until the determination of that certain action now pending in the Circuit Court within and for the county of Minnehaha, in the State of South Dakota, wherein the State of South Dakota is complainant and Edward J. Taber and other persons therein designated by name are defendants, and all persons unknown having or claiming to have any right, title or interest in or to the estate of the said John McClellan, deceased, are also defendants, has been determined or until the further order of the court herein.

"Done at Sioux Falls, South Dakota, this 18th day of March, 1909.

"JOHN E. CARLAND, *Judge.*"

That thereafter and on the 29th day of March, 1909, these petitioners made application to the said Circuit Court and procured an order upon the State of South Dakota and the attorney general thereof to show cause before the said Circuit Court why the said orders staying proceedings should not be set aside and vacated and why the suit of these petitioners should not proceed immediately to a speedy hearing and determination of the same, which order so obtained, omitting the title, is as follows, to-wit:

> *"To the State of South Dakota and Attorney General thereof and the County of Minnehaha and State's Attorney thereof:*
>
> "You will please take notice: that upon consideration of the annexed affidavit and petition of Melvin Grigsby, the court being duly advised in the premises and reason therefor appearing, it is hereby
>
> "Ordered, that you and each of you show cause before this court, at the United States Postoffice Building, in the city of Sioux Falls, county of Minnehaha and State of South Dakota, on the 12th day of April, 1909, at ten o'clock a. m. of that day, why the orders of this court staying proceedings herein, dated respectively, January 4, 1909, and March 18, 1909, should not be vacated and set aside and why this suit should not proceed immediately to a speedy hearing and determination of the same, according to the statutes of the United States and rules of this court; that a copy of this order and the said affidavit and petition of said Melvin Grigsby be forthwith served upon George J. Danforth, State's attorney within and for said county and State.
>
> "Dated this 29th day of March, 1909.
>
> "By the Court:
>
> "JOHN E. CARLAND, *Judge*."

That return to the said order to show cause was duly made by the attorney general and the matter coming on for hearing before the said Circuit Court on the 14th day of April, 1909, and having been duly considered the court entered an

order overruling the application contained in the said order to show cause, which order so overruled the said application, omitting the title, is as follows, to-wit:

> "The order to show cause, returnable on the 12th day of April, 1909, and adjourned by consent to the date hereof, why the order made by this court staying proceedings herein, dated respectively, January 4, 1909, and March 18, 1909, should not be vacated and set aside, and why this suit should not proceed immediately to a speedy hearing and determination of the same, coming on regularly for hearing at the court room in the Federal building in the city of Sioux Falls, in the said district, Grigsby & Grigsby appearing in support of the same and S. W. Clark, George J. Danforth, and U. S. G. Cherry appearing in opposition thereto, and the court having heard the arguments of counsel and being fully advised in the premises and having considered the matter, it is hereby ordered:
>
> "That the application contained in the said order to show cause be, and the same hereby is, in all things overruled and denied.
>
> "Dated at Sioux Falls, South Dakota, this 14th day of April, 1909.
>
> "By the Court:
>
> "JOHN E. CARLAND, *Judge.*"

That thereafter and on the 22nd day of April, 1909, your petitioners applied to the United State Circuit Court of Appeals for the Eighth Circuit for a writ of mandamus commanding Judge John E. Carland to vacate his said order staying proceedings in the Circuit Court for his district, and in their petition to the said Circuit Court of Appeals your petitioners, after setting out all of the proceedings had before Judge Carland in the Circuit Court substantially as hereinbefore stated, concluded as follows:

> "Your petitioners further allege that the said orders staying proceedings, Exhibit "E" and Exhibit "F," have never been vacated or set aside; that the

said order, Exhibit "H," refusing to vacate and set aside the said orders staying proceedings has never been vacated or set aside That said orders were made by said Circuit Court arbitrarily and unlawfully and in violation of the right which your petitioners have under the Constitution and laws of the United States to have their said action in the Circuit Court tried by the said court in the ordinary course of procedure, and that your petitioners have no remedy by appeal or writ of error to review the said orders.

"Wherefore your petitioners pray that this court issue to the Honorable John E. Carland, District Judge of the United States for the District of South Dakota and holding the circuit court in said district, a writ of mandamus, commanding him to vacate and set aside said orders staying proceedings in said action and to proceed to try and determine said action in the usual course of procedure without regard to the pendency of the proceeding, hereinbefore alleged, now pending in the courts of the State of South Dakota."

That the said petition for writ of mandamus was heard by the United States Circuit Court of Appeals and denied, and that the order denying said application and dismissing the petition for writ of mandamus is shown by the following certified copy of the record thereof in said court:

"UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

"DECEMBER TERM, 1908.

"No. 99, Original.

"THURSDAY, *April* 22, 1909.

"JOHN C. MCCLELLAN *et al., Petitioners,*

vs.

"JOHN E. CARLAND, *United States District Judge for the District of South Dakota.*

"On Petition for Writ of Mandamus.

"This cause came on this day to be heard upon the original petition (or information) for a writ of mandamus, and was argued by Mr. Melvin Grigsby, of counsel for petitioners.

"On consideration whereof, the court being fully advised in the premises, it is now here ordered and adjudged that said petition for a writ of mandamus herein be, and the same is hereby, denied; and that the petition for such writ be, and the same is hereby, dismissed at the costs of the petitioners, except that no attorney's fee shall be taxed in favor of the respondent.

"April 22, 1909."

Specification of Error.

The Circuit Court of Appeals of the Eighth District erred in overruling and denying the petition for a writ of mandamus as prayed for by the petitioners.

BRIEF AND ARGUMENT.

I.

Could the Circuit Court of Appeals rightfully stay proceedings of an action there pending to await the commencement and determination of another action in a State court?

These petitioners in presenting their application to the United States Circuit Court of Appeals for a writ of mandamus relied mainly upon the case of Barber Asphalt Paving Company against Judge Morris, decided by the same court in 1904.

132 Fed., 945.

In that case the complainants, as in this, brought suit in the United States Circuit Court claiming jurisdiction of the court on the ground of diversity of citizenship.

In the case of the Asphalt Paving Company against Morris the circuit court granted a stay of proceedings on the ground that actions were pending in the State court involving the same subject-matter as that of the case brought in the circuit court.

It was not claimed in that case and is not claimed in this that the circuit court did not have jurisdiction of the suit.

The only difference between that case and the one at bar is that in that case the court granted a stay of proceedings because there were other actions pending in the State courts involving the same subject-matter, and the stay was granted to await the determination of those actions, while in this case the stay of proceedings was granted to allow the State of South Dakota 90 days within which to begin an action in a proper court to establish its title to the property in question, and if such action was brought within that time then the suit in the circuit court was to be stayed to await the result of such action.

We have not been able to find precedent for the ruling of the circuit court in this case. We take it, however, that there can be no difference in principle between staying proceedings to await the result of actions already begun and staying proceedings to permit an action to be begun, and that if authority could be found sustaining one of these positions it would also sustain the other.

In the opinion in Barber Asphalt Paving Company against Morris, delivered by the learned Judge Sanborn, it was said:

> "It is, however, earnestly argued that the order of the court below constituted neither a bar nor an abatement of the action before it, but that it was a mere discretionary order staying proceedings for a definite time, and hence not subject to challenge upon an application for a writ of mandamus. The answer is that it stayed proceedings until they would in all probability be futile, until the petitioner would probably be estopped by the final judgments of other courts from any hearing or trial of its controversy upon the merits in the courts of the nation."
>
> Insurance Co. *vs.* Harris, 97 U. S., 331, 336, 338; 24 L. Ed., 959.

> "The reason for the rule that the pendency of an action in a State court is no bar and furnishes no ground for the abatement of another action for the same cause between citizens of different States in the Federal court is that the latter court has concurrent jurisdiction of such controversies with the courts of the State, and that citizens of different States have the constitutional right to the independent opinion and judgment of the judges of the national courts upon the questions presented by their controversies at least until those questions have become *res adjudicata* by the judgments of other competent courts. Orders that such citizens shall secure no such opinions until they are conclusively estopped from obtaining them by the final judgments of other courts upon their controversies as effectually deprive them of their rights to adjudications in the national courts as judgments sustaining pleas in bar or in abatement.

> Nay, they deprive them of those rights more effectually, because such judgments are reviewable by appeal or by writ of error, while such stays may not be so challenged. The power is granted to the judges of the circuit court and the duty is imposed upon them by the Constitution and the acts of Congress to form and express their independent opinions upon controversies between citizens of different States over which the jurisdiction of their courts is properly invoked. However grateful to them and courteous to others it would be in cases of concurrent jurisdiction to await the opinions of the respected and able jurists who adorn the benches of the courts of the States, and then to be bound by their decisions, that power may not be lawfully abdicated, nor may that duty be legally renounced, by the judges of the Federal courts. The order staying proceedings in the action in the circuit court until the final determination of the appeals in the State courts is violative of these principles, calculated to deprive the petitioner of its right to the independent decision of the Federal court upon the question involved in its controversy, and it cannot be sustained."

The same reasoning will apply in this case, unless there is a difference between the two cases arising out of the fact that in one case the opposing party in the State court was one of the cities of the State, while in the other the State itself was claiming an interest in the subject-matter of the suit.

Many decisions of this and other courts besides those cited by Judge Sanborn sustain the same doctrine.

In Harkrader *vs.* Wadly, 172 U. S., 150; 43 L. Ed., 399, the court, in speaking through Judge Shiras, said:

> "Two propositions have been so firmly established by frequent decisions of this court as to require only to be stated; first (Referring to criminal cases.)
>
> "Second, when a State court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully

> performed and the jurisdiction involved is exhausted, and this rule applies in both civil and criminal cases." (Citing authorities.)

In Smyth *vs.* Ames, 169 U. S., 466; 42 L. Ed., 819, the Supreme Court, speaking through Judge Harlan, said:

> "One who is entitled to sue in a Federal circuit court may invoke its jurisdiction in equity wherever the established principles and rules in equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in the State court of the same cause of action."

And, again, in the same decision:

> "A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals."

In both Lang *vs.* Choctaw & Gulf R. R. Co., 160 Fed., 359, and Sullivan *vs.* Algrem, 160 Fed., 366, Judge Sanborn used the following language:

> "The court which first acquires the lawful jurisdiction of specific property by the seizure thereof, or by the due commencement of a suit, from which it appears that it is, or will become, necessary to a determination of the controversy involved or to the enforcement of its judgment or decree therein for the court to seize, to charge with a lien, or to exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court so far as necessary to accomplish the purpose of the suit, and entitles that court to retain the control of it requisite to effectuate its final judgment or decree therein free from the interference of every other tribunal."

Gordon *vs.* Logest, 16 Peters, 97; 10 L. Ed., 901, is a case in which an application for removal from the Circuit Court

of Kentucky to the Circuit Court of the United States was denied; the court said:

> "This is the first instance known to us in which a State court has refused to a party a right to remove his cause to the Circuit Court of the United States. And it is impossible to conceive of a case in which the right of removal could be more unquestionable than in this case.
>
> "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress. But this object would be defeated if a State judge, in the exercise of his discretion, may deny to the party entitled to it a removal of his cause."

In re Langford, 57 Fed., 570, in which case there was a petition for a writ of *habeas corpus* to take a prisoner from the custody of State officers on the ground that he was restrained in violation of the United States Constitution, the court said:

> "The return suggests that comity between the courts should induce this court to hold its hand, and leave the determination of the questions involved in this case to the State courts. It is the duty of a judge, when relief is sought before him in a matter within his jurisdiction, speedily to hear the plaint, and, if the party is entitled to the relief, to give it. He cannot shift from his shoulders the responsibilities of his judicial function, and impose them upon another. Strong as the temptation is, and agreeable as it would be to do so, he cannot do it without loss of self respect."

II.

The writ of mandamus from the Circuit Court of Appeals was the proper and only available remedy for the correction of the error made by the Circuit Court in staying proceedings in that court.

This subject is so fully discussed by the learned Judge Sanborn in Barber Asphalt Paving Company against Morris, *supra,* that further citation of authority is not deemed necessary.

III.

Could the Circuit Court properly stay proceedings on the ground that it was necessary for the protection of the State of South Dakota, the State having appeared in that court claiming to be an interested party?

It is evident from the opinion filed by the learned judge of the Circuit Court, heretofore quoted, in the statement of the case, that his reason for postponing the action in his own court was because he deemed it a matter of equity in order to give to the State an opportunity to establish its claim to the property.

While the Circuit Court of Appeals, in denying the writ of mandamus, did not render an opinion in writing, it was orally stated, to the best recollection of the attorneys for the petitioners, that the rule established by the decision in Barber Asphalt Paving Company did not apply, because in the matter presented to them it appeared that in the suit of the petitioners against George T. Blackman, as administrator, the State of South Dakota had formally appeared and claimed title to the property in question, and that therefore the Circuit Court could not proceed without making the State a party, and that to make the State a party would

oust the jurisdiction of the court under the eleventh amendment of the Constitution of the United States.

The court also stated that they were controlled by the decisions in State of Minnesota *vs.* The Northern Securities Co., 184 U. S., 200, and California *vs.* Southern Pacific Company, 157 U. S., 229, and referred particularly to the following portion of the opinion of Judge Shiras in the Northern Securities case:

> "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel.
>
> "Shields *vs.* Barrow, 17 How., 130; 15 L. Ed., 158.
>
> "Hipp *vs.* Babin, 19 How., 271-278; 15 L. Ed., 633-635.
>
> "Parker *vs.* Winnipiseogee Lake Cotton & Woolen Co., 2 Black., 545; 17 L. Ed., 333."

In both the Securities Company case and that of the Southern Pacific Company this court held that the complaints disclosed that the relief could not be granted as prayed for without affecting the rights of others not parties to the suits.

In the case at bar there is nothing in the bill of complaint of your petitioners in the Circuit Court from which it can be gathered that the State or any party, except only the petitioners and the defendant, had any interest whatever in the subject-matter of the suit, unless it can be claimed that in every case wherein heirs seek to establish title to the property of a decedent the State is a necessary party, and can claim the right of intervention on the ground that the property of all decedents escheats to the State in default of legitimate heirs.

The State of South Dakota petitioned the Circuit Court for leave to intervene, claiming to be the owner of the property in question, because the same had escheated to the State, making a case almost exactly in line with—

United States *vs.* Judge Peters, 5th Cranch, 115,

wherein Chief Justice Marshall, writing the opinion, said:

> "It is contended that the Federal courts were deprived of jurisdiction, in this cause, by that amendment of the Constitution which exempts States from being sued in those courts by individuals. This amendment declares, 'that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.'
>
> "The right of the State to assert, as plaintiff, any interest it may have in a subject, which forms the matter in controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a State. The State cannot be a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. In this case, the suit was not instituted against the State or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however, wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State of property, in possession of an individual, must

arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title."

The State of South Carolina *vs.* Edward B. Wesley, 155 U. S., 543; 39 L. Ed., 254, is almost identical in principle with the case here presented.

In that case the action was brought by a citizen of the State of New York against citizens of the State of South Carolina to recover possession of certain real estate. The defendant denied the allegations of the complaint, and as a second defense claimed that he was in possession of the property as the secretary of state of the State of South Carolina, disclaiming any individual right, title, or interest in the property. Before the trial came off the attorney general appeared on behalf of the State and suggested to the court and gave it to understand and be informed that the property in controversy was in the possession of and belonged to the State, and insisted that on that account the court had not jurisdiction of the subject in controversy, and moved that the complaint be set aside and all proceedings dismissed.

The Circuit Court overruled the motion to dismiss, and a writ of error having been allowed, this court sustained the ruling of the lower court and cited:

United States *vs.* Peters, 9 U. S., 5th Cranch, 115 (3: 53).

The Exchange *vs.* McFadden, 11 U. S., 7 Cranch, 116 (3: 287).

Osborn *vs.* Bank of United States, 22 U. S., 9 Wheat., 738 (6: 204).

United States *vs.* Lee, 106 U. S., 196 (27: 171).

Stanley *vs.* Schwalby, 147 U. S., 508 (37: 259).

Again in—

Tindal *vs.* Wesley, 167 U. S., 203-206; 42 L. C. P., 137,

which seems to be the leading case on this subject and a branch of the case last above cited, this court again reviewed many prior decisions, referring to the case of United States *vs.* Lee as the leading case on the subject, and in the opinion said:

> "We now repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this court in United States *vs.* Peters:
>
> " 'It certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the subject and examining the validity of the title.' "

The fundamental error in the reasoning of the Circuit Court of Appeals seems to have been in holding that a decision in favor of the plaintiffs in the court below would be binding upon the State of South Dakota.

That such would not have been the case has been repeatedly decided by this court. For instance, in—

Tindal *vs.* Wesley, *supra,*

in the opinion written by Judge Harlan, it was said:

> "It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its right to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine

controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

The same doctrine was laid down in—

United States *vs* Lee, 16 Otto, 196-251; 27 L. C. P., 171,

and in—

Carr *vs.* United States, 98 U. S., 433; 25 L. C. P., 209.

In the last above cited case the point was directly raised as to whether a judgment against a defendant who claimed title under the United States could be set up by way of estoppel in an action brought by the United States to quiet title to the same land.

It was held that such judgment was no estoppel, even though in the former action the United States district attorney for the district, and other counsel employed by the Secretary of the Treasury, attended at the trial on behalf of the defendant.

IV.

"As to Jurisdiction of the Circuit Court."

That the Circuit Court had jurisdiction of the suit of John McClellan *et al. vs.* George T. Blackman, as administrator, seems to have been settled beyond all controversy by this court in—

Payne *vs.* Hook, 7 Wall., 425; 19 L. Ed., 260.

Byers *vs.* McAuley, 149 U. S., 608; 37 L. Ed., 867, and cases cited in the later case of—

Ingersoll *vs.* Coram, Advance Sheets U. S. Supreme Court, January 15h, 1909.

We therefore submit that the petitioners will be deprived of their rights under article 3 of section 2 of the Constitution of the United States unless the order of the Circuit Court of Appeals shall by this honorable court be reversed.

Respectfully submitted,

GRIGSBY & GRIGSBY,
Counsel for Petitioners.

MELVIN GRIGSBY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, *et al., Petitioners,*

vs.

JOHN E. CARLAND, U. S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY TO THE SPECIAL APPEARANCE OF JOHN E. CARLAND, FILED HEREIN JANUARY 24, 1910.

In substance, the affidavit of the Hon. John E. Carland, filed herein on January 24, 1910, recites that when, on the 29th day of November, 1909, he signed the stipulation herein found on page 16 of the transcript of record, he was under the impression that the records which had been filed and used before the United States Circuit Court of Appeals for the Eighth Circuit, on the application of the petitioners for a writ of mandamus, were a full and complete copy of all of

the records of his Court pertaining to the orders complained of, and the Honorable District Judge further states that had he known that a full and complete copy of all of the records of his Court had not been submitted to the Circuit Court of Appeals, he would not have signed such stipulation.

We most respectfully suggest to this Honorable Court that the only effect of the said stipulation so signed by the Honorable Judge was to relieve the petitioners from the necessity and the expense of securing a second certified copy of the records of the Circuit Court of Appeals for transmission to this Court in obedience to the writ of certiorari issued from this Court, the first certified copy having been under the rules of the Court made a part of the petition for the writ of certiorari.

While it is true that the application to the Circuit Court of Appeals was made upon affidavits setting up in substance what had transpired in the Circuit Court, with complete copies of only such parts of the records there as the petitioners deemed necessary, in order to secure the relief prayed for, it cannot be claimed that anything was omitted which, had it been presented to the Circuit Court of Appeals, would have caused that Court to have rendered a different decision.

We do not understand that the defendant by his special appearance has asked leave to withdraw his stipulation, or that he moves to dismiss this case because of his misapprehension of existing conditions at the time he signed the stipulation, but that he requests this Court to examine the whole record of the Circuit Court in arriving at a decision herein.

While we have no objection to having this Court enter into a minute examination of every part of the record made in this matter in the Circuit Court, or in any other court, we are not aware that it has been the practice of this Court

to go behind the records of the Court to which their writ is directed.

We further make reply that in presenting our petition to the Circuit Court of Appeals of the Eighth Circuit we followed exactly the precedent which had been set by the petitioners in the case of the Barber Asphalt Paving Company against Judge Morris, which was an application for a writ of mandamus made to the same Court, and we were under the impression that we were presenting as much of the record as would be necessary for the Circuit Court of Appeals to fully understand the question presented.

We further most respectfully suggest that when a citizen of the United States files his bill of complaint in a Circuit Court of the United States on the ground of diversity of citizenship, and in a matter over which that Court has jurisdiction, there are no conditions and no circumstances under which such Circuit Court can, rightfully, enter an order therein staying proceedings to await the commencement and determination of some other action in some other Court, and it seems to us that the special appearance made herein on behalf of the Honorable District Judge by the Attorney-General and other counsel, illustrates the wise provision of the Constitution of the United States which enables a citizen of one State to bring his cause against a citizen of another State in a Court supposed to be independent of local influence.

Respectfully submitted,

GRIGSBY & GRIGSBY,

For Petitioners.

MELVIN GRIGSBY,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, ET AL., PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT AND SUGGESTIONS ON BEHALF OF JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

FREDERIC D. McKENNEY
For John E. Carland, Appearing Specially.

S. W. CLARK
Attorney General of South Dakota,
U. S. G. CHERRY
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, ET AL., PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Statement and Suggestions on Behalf of John E. Carland, United States District Judge, Appearing Specially.

Statement of Case.

This case comes before this honorable court on a writ of certiorari issued as prayed in petitioners' petition (p. 19), under the provisions of section six (6) of the act of Congress entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891. In addition to the prayer for the writ itself, petitioners also pray that they "may have such other and further relief or remedy in the premises as to this

court may seem appropriate *and in conformity with the said act.*" (Petition, p. 20.)

If the case is properly before this court, under and in conformity with the provisions of the act of March 3, 1891, aforesaid, then every question that was open for debate before the Circuit Court of Appeals for the Eighth Circuit is open for review in this court.

On the 22d of April, 1909, the petitioners here, John C., James S., William S., Walter, and Edmund McClellan, by and through their attorneys, Messrs. Grigsby & Grigsby, filed in the Circuit Court of Appeals for the Eighth Circuit, their original petition for a writ of mandamus, and same was docketed on the docket of Original Actions in that court, it being case No. 99, Original, and upon consideration of said petition leave was "granted to file and docket the same." (R., 1.)

By that petition, petitioners averred that on the 8th day of September, 1908, they had instituted suit against George T. Blackman, *special administrator* of the estate of John McClellan, deceased, in the Circuit Court of the United States for District of South Dakota, Southern Division, by filing therein their bill of complaint, as per a true copy annexed to said petition and made a part thereof (R., 2).

Said bill of complaint in essential part is as follows, viz (italics ours):

> To the Honorable the Judges of the Circuit Court of the United States for the District of South Dakota, in Chancery sitting:
>
> John C. McClellan, a citizen and resident of Ellis County, in the State of Texas; James S. McClellan, a citizen and resident of Pulaski County, in the State of Arkansas; William S. McClellan, a citizen and resident of Teller County, in the State of Colorado, and Walter McClellan and Edmund McClellan, both of whom are citizens and residents of Allegheny County, in the State of Pennsylvania, bring this their

bill of complaint against George T. Blackman, a citizen and resident of the State of South Dakota, *as special administrator of the estate of John McClellan, deceased,* and thereupon your orators, and each of them, complain, allege, and show to the court:

First.

That *John McClellan,* whose true name was John McClelland, was a citizen and resident of the County of Minnehaha and State of South Dakota, *died, intestate,* on or about the 31st day of August, 1899, in the City of Sioux Falls, *County of Minnehaha, and State of South Dakota,* and that said deceased *left an estate in the aforesaid county and State* consisting of real and personal property of the value at the time of his death, aforesaid, so far as is known to these complainants of about the sum of Thirty-three Thousand Dollars (33,000.00).

Second.

That thereafter and on or about the 8th day of February, 1900, the County Court in and for said County of Minnehaha and State of South Dakota, after due and regular proceedings therein made, filed and entered its order and issued letters of administration to one William Van Eps, of said County and State, as administrator of the said estate of said John McClellan, deceased. That said William Van Eps duly qualified as such administrator and did take possession of the said estate and held possession thereof until on or about the 12th day of July, 1906, when the said William Van Eps departed this life.

Third.

That thereafter such proceedings were had in the said County Court in the matter of the said estate, that on or about the 17th day of September, 1906, the said *court made, filed, and entered its order and issued letters of special administration to George T. Blackman,* defendant above named, *as special administrator of the said estate.* That the said George T. Blackman did then and there qualify *as such special administrator and did then and there take possession*

of the said estate and ever since has been and is now the duly appointed, qualified, and acting special administrator of the said estate of said John McClellan, deceased.

Fourth.

Your orators further allege and show that the value of the said estate of said John McClellan, deceased, situated and located within the State of South Dakota, *and now in the possession and control of said George T. Blackman, as special administrator thereof,* was on the first day of June, 1907, in excess of the sum of Thirty-five Thousand Dollars ($35,000.00); that the said estate at that time consisted of real estate situated in the City of Sioux Falls, County of Minnehaha, and State of South Dakota, and farm lands in the County of Davison, State of South Dakota, cash in the hands of the said George T. Blackman, bank stock and certain miscellaneous notes and other personal property.

That since the said first day of June, 1907, the said George T. Blackman, as administrator, has rented, and collected, the rents from certain of the real estate and farming lands belonging to said estate and has deposited certain of the said cash in hand so as to obtain interest thereon for the benefit of said estate.

Fifth.

Your orators further allege and show that there are no outstanding claims against the said estate, and that all the creditors of the said John McClellan, deceased, have been paid and *that the said estate is now ready for distribution thereof according to the statutes of the State of South Dakota in such cases made and provided.*

* * * * * * *

Ninth.

Your orators further allege and show that the complainants, John C. McClellan and James S. McClellan, are sons and the complainants, William S. McClellan, Walter McClellan, and Edmund McClellan, are the grandsons of the said John McClellan, deceased, *and*

that your orators are the sole surviving heirs-at-law and next of kin of the said deceased and are lawfully entitled to inherit the estate of the said deceased under and by virtue of the laws and statutes of the said State of South Dakota.

In consideration whereof, and inasmuch as your orators have no sufficient remedy at law and are only relievable in a court of equity where matters of this character are cognizable and reviewable, to the end, therefore, that your orators may obtain the relief to which they are justly entitled in the premises, and which they can only obtain in a court of equity, *your orators pray the court to grant them due process by subpœna directed to said George T. Blackman, as special administrator of the estate of John McClellan, deceased, commanding and requiring him to appear herein and answer,* but not under oath, the same being expressly waived, the several allegations in this your orators' bill contained.

And your orators further pray that upon the final hearing it be ordered and decreed that your complainants, John C. McClellan and James S. McClellan, are sons and your complainants, William S. McClellan, Walter McClellan, and Edmund McClellan, are grandsons of said John McClellan, deceased, and that your orators are the sole surviving heirs-at-law and next of kin of said deceased and entitled to inherit the said estate; and that the title in fee to all of the said real estate is in them, the said complainants, and that it be further ordered and decreed that the said George T. Blackman, special administrator and defendant herein, render a just and true account of all the moneys and credits, bank stock, rents, and interest collected and other personal property now in his hands belonging to the said estate, and that, after deducting his lawful fees and expenses lawfully incurred as such administrator, he distribute all of the personal property in his hands, as such special administrator, according to the laws of the State of South Dakota, in such cases made and provided, to-wit: To complainants, John C. McClellan and James S. McClellan, one-third to each thereof, and to complainants, William S. McClellan, Walter McClellan,

and Edmund McClellan, to each one-ninth thereof, and failing so to do that these complainants may have judgment against him, the said George T. Blackman, as special administrator, for the total value of all of the said personal property found to be in his hands and under his control.

That pending a determination of this suit, the said George T. Blackman, as special administrator aforesaid, be directed and required to hold intact the said estate, and both real and personal property thereof, and that he may be enjoined pendente lite from disposing or attempting to dispose of, or from distributing, and from assigning or turning over to any person or persons whatsoever, the said estate or any part thereof until further order of this court in the premises; and that the court grant such other and different relief herein as may be equitable and just.

And your orators as in duty bound will ever pray.

JOHN C. MCCLELLAN,
JAMES S. MCCLELLAN,
WILLIAM S. MCCLELLAN,
WALTER MCCLELLAN,
EDMUND MCCLELLAN,
By GRIGSBY & GRIGSBY,
Solicitors and of Counsel for Complainants.
Sioux Falls, S. Dak.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Personally appeared Melvin Grigsby, who being first duly sworn, deposes and says: That he is a member of the firm of Grigsby & Grigsby, solicitors and of counsel for the complainants above named; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true to the best of his knowledge, information, and belief; that the reason that this verification is not made by the said complainants or either of them is that none of the said complainants are residents of or now within the County of Minnehaha and State of South Dakota, wherein deponent resides.

MELVIN GRIGSBY.

Subpœna to answer this bill of complaint was issued on the 8th day of September, 1908, and served by the United States marshal upon Blackman, *special administrator,* on the 14th day of the same month (24, 25).

Petitioners further averred that on the 25th day of September, 1908, the defendant, Blackman, filed his answer to said bill of complaint as per copy annexed to and made a part of said petition (R., 2). This answer, expressly admitting the averments of the first, second, and fourth paragraphs of the bill of complaint, and denying the averments of the fifth, sixth, seventh, eighth, and ninth paragraphs thereof, concluded with the submission of the entire matter to the judgment of said Circuit Court of the United States (R., 8, 26).

It is signed by George T. Blackman in proper person, no attorney appearing in his behalf.

That on the 28th day of October, 1908, petitioners filed replication to this answer of defendant (R., 2), asserting their readiness to "prove their said bill to be true and sufficient, and that the answer is untrue and insufficient" (9, 27).

That on the 24th day of November, 1908, the State of South Dakota applied to said Circuit Court of the United States for leave to file a petition for intervention in said cause; that said Circuit Court ordered both the petitioners and the defendant, Blackman, to show cause why such leave should not be granted; that cause was shown by petitioners, and the court having heard arguments and being sufficiently advised in the premises, on the 4th day of January, 1909, "entered an order overruling the motion of the said State of South Dakota for leave to intervene," as per copy of said order, made a part of said petition (R., 2).

This order in salient part is as follows, viz:

Ordered, That the motion of the said State of South Dakota for leave to intervene herein be and the same is overruled and denied, and it is

Further ordered that the further prosecution of this action be and the same is hereby stayed for a period of ninety days from and after December 24th, 1908, for the purpose of allowing the State of South Dakota to commence a proper action or proceeding in the proper court to establish its alleged title and interest in and to the said property and estate of the said decedent and that in the event that such action is commenced within this time, then that this action and the prosecution thereof be further stayed until the determination of such action brought by the State of South Dakota and that in case no such action is commenced by the State of South Dakota within the time herein specified, then that this action shall proceed as equity and justice may require.

Done at Sioux Falls, South Dakota, this 4th day of January, 1909 (R., 11).

That thereafter on the 18th day of March, A. D. 1909, and upon the showing made by the affidavit of the State's attorney for Minnehaha County, South Dakota, said Circuit Court entered a further order further staying proceedings in said cause, which further order in salient part is as follows, viz:

On the affidavit of George J. Danforth, State's attorney within and for the County of Minnehaha and State of South Dakota, and on all the files, pleadings, and proceedings hereinbefore had, and on application of said Danforth as State's attorney within and for the said county and S. W. Clark, Attorney General within and for State of South Dakota, and U. S. G. Cherry as special counsel for said State's attorney and Attorney General,

It is hereby ordered that the further prosecution of the above entitled action by the said complainants be, and the same is hereby, stayed until the determination of that certain action now pending in the Circuit Court within and for the County of Minnehaha

> in the State of South Dakota, wherein the State of South Dakota is complainant and Edward J. Taber and other persons therein designated by name as defendants, and all persons unknown having or claiming to have any right, title, or interest in or to the estate of the said John McClellan, deceased, are also defendants, has been determined or until the further order of the court herein (R., 12).

The affidavit referred to in this order established the fact that an independent action of escheat had been instituted with respect to this estate by the State of South Dakota in its proper court and under the laws of that State.

That thereafter petitioners made application to said Circuit Court for an order requiring the State of South Dakota and the Attorney General thereof, and the County of Minnehaha and the State's attorney thereof, to show cause why the orders aforesaid staying further proceedings in said Circuit Court should not be vacated and set aside and why the suit of petitioners should not proceed to a speedy hearing and determination: that such an order was passed by said Circuit Court; that both said State and said county made due return thereto (R., 2), and that thereafter, after hearing and upon due consideration, said Circuit Court refused to vacate and set aside the orders complained of, as per the following copy of the order of said Circuit Court, dated the 14th day of April, A. D. 1909, which was made a part of said petition, viz:

> The order to show cause, returnable on the 12th day of April, 1909, and adjourned by consent to the date hereof, why the orders made by this court staying proceedings herein, dated respectively January 4th, 1909, and March 18th, 1909, should not be vacated and set aside, and why this suit should not proceed immediately to a speedy hearing and determination of the same, coming on regularly for hearing at the court room in the Federal Building in the City of Sioux Falls, in the said district, Grigsby & Grigsby

appearing in support of the same and S. W. Clark, George J. Danforth and U. S. G. Cherry appearing in opposition thereto, and the court having heard the arguments of counsel and being fully advised in the premises, and having fully considered the matter, it is hereby ordered:

That the application contained in the said order to show cause be and the same hereby is in all things overruled and denied.

Dated at Sioux Falls, South Dakota, this 14th day of April, 1909.

That no one of the three orders above particularly referred to have ever been vacated or set aside; that said orders were made by said Circuit Court arbitrarily and unlawfully," and *in violation of the right which your petitioners have under the Constitution and laws of the United States,* to have their said suit in the Circuit Court tried by the said court in the ordinary course of procedure; wherefore, petitioners prayed the issuance of the writ of mandamus, commanding John E. Carland, United States District Judge, &c., "to vacate and set aside said orders staying proceedings in said action" and "to proceed to try and determine said action in the usual course of procedure without regard to the pendency of the proceeding * * * now pending in the courts of the State of South Dakota" (R., 3).

That petition was duly sworn to by Melvin Grigsby, Esq., one of the attorneys for petitioners here (R., 3).

No rule to show cause based on this petition or otherwise was issued out of the Circuit Court of Appeals; no appearance by or on behalf of the United States District Judge, whose orders in the premises were assailed as arbitrary and unlawful, was made, but the matter having come on "to be heard upon the original petition (or information) for a writ of mandamus" * * * "was argued by Mr. Melvin Grigsby, of counsel for petitioners," and on the very day on which it was permitted to be filed and docketed, viz: April 22,

1909, said petition was denied and dismissed at the costs of petitioners" (R., 15).

Thereafter petitioners, still acting by and through their attorneys, Messrs. Grigsby & Grigsby, "Melvin Grigsby, of counsel," filed in this honorable court their record of the proceedings had in the Circuit Court of Appeals for the Eighth Circuit, as above outlined, together with their petition for writ of certiorari based thereon. Among other things, it is averred in said petition for certiorari filed here that

> "Your petitioners have no right of appeal or writ of error herein to this honorable court, because the jurisdiction of the Circuit Court depended entirely on diverse citizenship."
>
> *"The order staying proceedings in the Circuit Court* and the order of the Circuit Court of Appeals refusing the relief there prayed for *are in effect final orders or decisions,"*

and that petitioners

> "have been deprived of rights guaranteed to them by section two (2) of article three (3) of the Constitution of the United States" (Petition, 19).

It may be conceded at once that in cases of concurrent jurisdiction the mere pendency of an action in a State court is no bar and furnishes no ground for the abatement of another action for the same cause and between the same parties, being citizens of different States, pending in a Federal court; and further that citizens of different States have a constitutional right to the independent opinion and judgment of the judges of the national courts upon the questions presented in their controversies, at least until those questions have become *res adjudica* by the judgments of other competent courts. In what we shall say hereafter we will not controvert in any degree the full strength of this admission. We will contend, however, that the case at bar, whatever may be its

superficial aspect, falls neither within the protection of the salutary principle so conceded, nor when examined and fully understood will it be found to contain, in so far at least as the petitioners are concerned any such elements of hardship or judicial oppression and error as will appeal with sympathetic force to the supervisory and corrective powers of this court.

As above indicated, no alternative writ or rule to show has issued at any time out of either this honorable court or the United States Circuit Court of Appeals for the Eighth Circuit to the honorable district judge for South Dakota, who is named as respondent in these proceedings. The proceedings had in the Circuit Court of Appeals were wholly *ex parte*, said district judge "did not appear therein, and was not represented, and had no knowledge of any of said proceedings until long after the termination thereof in the said United States Circuit Court of Appeals" (17).

Said respondent, however, voluntarily appears before this court, entering such appearance "specially," not for the purpose of contesting the jurisdiction of this honorable court to review by its writ of certiorari issued pursuant to the provisions of the sixth (6th) section of the act of March 3, 1891, the final order of the Circuit Court of Appeals refusing on an original application to issue its great writ of mandamus, but merely for the purpose of *suggesting*, as respondent deems himself in duty bound to do, the possible absence or want of any such jurisdiction under the circumstances of this case. If upon due consideration this honorable court should be of opinion that it is possessed of jurisdiction under the provisions of said section six (6) of said act of March 3, 1891, aforesaid, by writ of certiorari to review the final order of the Circuit Court of Appeals in question, then said district judge waiving all alternative writs and rules to show cause prays that his affidavit and accompanying "Exhibit A," the latter being a true and complete transcript of all of the record

and files, with the exception of the obligation for costs, entered of record in the cause of John McClellan and others against George T. Blackman, special administrator of the estate of John McClellan, deceased, as fully as the same appear upon the original records and files of the office of the clerks of the Circuit Court of the United States for the district of South Dakota, may be received and considered in all respects as though the same were before this honorable court upon a formal return to a rule to show cause duly issued and served.

JURISDICTION.

First, upon the face of the partial or incomplete record filed by petitioners considered in the light of the provisions of section 6 of the act of March 3, 1891;

Second, upon the face of such partial or incomplete record considered in the light of prior adjudications of this Honorable Court.

The proceeding in the Circuit Court of Appeals was an original proceeding. It did not depend upon the diverse citizenship of the parties named in the caption of the cause. No doubt such original proceeding was filed and the jurisdiction of the Circuit Court of Appeals was so invoked upon the theory that such proceeding was designed to foster or aid the appellate jurisdiction of said Court of Appeals with respect to a cause pending in an inferior Federal court, which cause, in so far as its right to Federal cognizance was concerned, depended solely upon the diverse citizenship of the parties named in its caption. But in their petition to this honorable court for the writ of certiorari petitioners expressly base their claim for consideration upon the grave importance of the principle supposed to be involved in the action of such inferior Federal court whereby it is contended that petitioners "have been deprived of rights guaranteed to them by

section two (2) of article three (3) of the Constitution of the United States."

The power of this court in a proper case to issue the common law writ of certiorari either to correct an excess of jurisdiction or generally in the furtherance of justice (Re., Chetwood, 165 U. S., 443) is not questioned nor is it here involved.

The prayer for the writ upon which this cause in its first aspect is before this court is based solely upon the provisions of the act to establish circuit courts of appeals (March 3, 1891).

Under section six (6) of that act, appellate jurisdiction to review by appeal or writ of error final decisions of existing circuit courts in all cases not specified in section five (5) of said act, was conferred upon the circuit courts of appeals established by said act, "unless otherwise provided by law," and it was declared in and by said section six (6) that the judgments or decrees "of the circuit courts of appeals should be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different States," and further that in any such case "it shall be competent for the Supreme Court to require, by certiorari, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

Upon the face of the petitioners' record and upon the face of the petition for certiorari filed in this court it is plain that in passing its final order refusing in an original proceeding to issue its writ of mandamus as per petitioners' prayer, the Circuit Court of Appeals was not exercising its "appellate jurisdiction to review by appeal or writ of error final decision" of the Circuit Court, nor was the final order of the Circuit Court of Appeals denying the mandamus a final judgment or decree passed in a case wherein the jurisdiction was

"dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different States."

The original application for the writ of mandamus was addressed to the discretionary power of the Circuit Court of Appeals. The writ of mandamus is not a writ of right. May this court by its statutory writ of certiorari supervise or coerce the discretionary power of the circuit courts of appeals? If so, what becomes of the quality of finality with which, with the view of relieving the burdens theretofore pressing upon this court, the Congress by its act of March 3, 1891, attempted to endow the circuit court of appeals?

The power of this court, in the furtherance of justice, to issue its common law writ of certiorari either to the Circuit Court of Appeals or to the circuit courts of the United States is not questioned. If the action of the Circuit Court, here complained of, and the refusal of the Circuit Court of Appeals by mandamus to revise the same has, in fact, resulted in a denial of justice, it is plain that the common law writ of certiorari, *on an original proceeding filed in this court,* was and is available for the correction of such an abuse. The statutory writ of certiorari under the provisions of the act of March 3, 1891, is not available for such purpose.

The remedy by certiorari provided by section six (6) of the act of March 3, 1891, is purely statutory. It is available solely in the cases, and in the manner and circumstances prescribed in the statute, and when all of the foregoing exist and suffice, then it is issuable only in the discretion of this court, which discretion as has been so often declared by the court itself, will be favorably exercised only in cases of gravity and of general importance.

Section 2 of the "Courts of Appeals Act" (March 3, 1891) declares—

> "that there is hereby created in each circuit a circuit court of appeals * * * which shall be a court

of record *with appellate jurisdiction,* as is hereafter limited and established" (italics ours).

Section 4 declares—

> "that * * * the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same."

Section 5 declares that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the six (6) classes of cases therein specifically described.

Section 6 declares—

> "that the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the * * * existing circuit courts in all cases other than those provided for in the preceding section (sec. 5) of this act, * * * and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the *jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different States;* * * * * * "in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.
>
> "*In all cases not* hereinbefore, in this section, *made final there shall be of right* an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy *shall exceed one thousand dollars* besides costs."

Section 10 declares—

> "that whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit courts shall be reviewed and determined in the Supreme Court, the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. *And* whenever on appeal or writ of error *or otherwise* a *case coming from a circuit court of appeals shall be reviewed* and determined *in the Supreme Court, the cause shall be remanded* by the Supreme Court *to the proper district or circuit court* for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise a *case coming from a district or circuit court shall be reviewed in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final,* such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination."

Section 12 declares—

> "that the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States."

Section 716, Revised Statutes of the United States, is as follows:

> "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias.* They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

It has become settled law that the writ of mandamus in the Federal courts is never an independent suit, as it is in many States and in England.

The courts of the United States have no power to acquire jurisdiction of a case or question by issuing a writ of man-

damus. Their authority in this regard is limited to the issuance of writs of mandamus in aid of their appellate jurisdiction and in such cases as are already pending and wherein jurisdiction has been obtained on other grounds and by other process.

McClung *v.* Silliman, 6 Wheaton, 601.
M'Intire *v.* Wood, 7 Cranch, 504.
Kendall *v.* U. S., 12 Peters, 524.
Riggs *v.* Johnson County, 6 Wallace, 166, 197, 198.
Secretary *v.* McGarrahan, 9 Wallace, 311.
Bath County *v.* Amy, 13 Wallace, 244.
Graham *v.* Norton, 15 Wallace, 427.
Greene County *v.* Daniel, 102 U. S., 187.
Davenport *v.* Dodge County, 105 U. S., 237.
Smith *v.* Bourbon County, 127 U. S., 105.
U. S. *v.* Williams (C. C. A., 1895), 67 Fed. Rep., 384.
U. S. *v.* Judges (C. C. A., 1898), 85 Fed. Rep., 179.
In re Forsyth, 78 Fed. Rep., 301.
Waite *v.* Santa Cruz, 89 Fed. Rep., 619.
Shepard *v.* Tulare Irrigation Dist., 94 Fed. Rep., 3.
Rosenbaum *v.* Board of Supervisors, 28 Fed. Rep., 223.

If the circuit courts of appeals have the power to issue writs of mandamus at all, that power is derived from the provisions of section 716 of the Revised Statutes as read into the Circuit Courts of Appeals Act by the terms of section 12 thereof, and it seems to have been settled beyond dispute that such courts in any event can issue such writ only in aid of their appellate jurisdiction, and in the exercise of their discretionary authority.

Barber Asphalt Paving Co. *v.* Morris (C. C. A., —). 132 Fed. Rep., 945.
In re Pacquet (C. C. A., 1902), 114 Fed. Rep., 437.
Travers Co. *v.* King Iron Bridge, etc., Co. (C. C. A., 1899), 92 Fed. Rep., 690.
United States *v.* Severns (C. C. A., 1896), 71 Fed. Rep., 768.

The circuit courts of appeals are courts of restricted and limited powers and the cases in which, and the conditions under which, this Honorable Court may review the decisions of the circuit courts of appeals are defined by the act of March 3, 1891, with much particularity.

It is apparent that the circuit courts of appeals do not and of right cannot exercise *general* supervisory authority to review by appeal or writ of error *or otherwise* all orders, judgments, or decrees of the circuit courts. The statute defines at least six (6) different classes of cases which may be heard in the circuit courts wherein the right of such review is directly lodged in this court. In such classes of cases it is apparent that the circuit courts of appeals can exercise no supervisory or appellate powers whatever.

Conceding that in the classes of cases made final in the Circuit Court of Appeals by section 6 this court has power by the terms of that section to review the final judgments of the circuit courts of appeals by the statutory writ of certiorari, it is submitted that the case at bar is not within the definition of any one of the classes so defined.

While it is true that such jurisdiction as the Circuit Court of Appeals had in the premises, if any it had, was such jurisdiction as was necessary to preserve and aid its right of appellate review, it is equally true, with respect to the jurisdiction of this court to issue its statutory writ of certiorari in the premises, that the case under consideration is not one wherein the Circuit Court of Appeals can be said or even be supposed to have exercised "appellate jurisdiction to review *by appeal or by writ of error final* decision in the * * * existing circuit courts" in a case other than such as are provided for in section 5 of the act, nor can the order or decision of the Circuit Court of Appeals denying petitioners' application for the writ of mandamus and dismissing their petition with costs reasonably be said to be a final judgment or decree of the Circuit Court of Appeals in a case "in which the jurisdiction is (was) dependent entirely upon the oppo-

site parties to the suit or controversy being * * * citizens of different States."

The parties to the suit or controversy before the Circuit Court of Appeals were the McClellans, as petitioners, and United States District Judge Carland as defendant or respondent.

It plainly appears from the petition for the writ itself that the interposition of the Circuit Court of Appeals in the premises was invoked solely upon the ground that the orders of the learned district judge temporarily staying further proceedings in the case were "in violation of the rights which your petitioners have under the Constitution and laws of the United States to have their said action in the Circuit Court tried by the said Circuit Court in the ordinary course of procedure" (R., 3).

It is plain that where the jurisdiction of either the Circuit Court or the Circuit Court of Appeals has been invoked on constitutional grounds the decision of the Circuit Court of Appeals in the premises is not final within the provisions of section 6 of the Courts of Appeals Act and the case is not of that class in which it is "competent for the Supreme Court to require, by certiorari (under this section) or otherwise" * * * such case to be certified for its review and determination.

Section 10 of the act of 1891 prescribes the course of procedure to be followed by this court in all cases coming before it from a circuit court of appeals by requiring that all such causes "shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such (its) determination."

It would seem to be plain that, at least in the absence of a general appearance, either in the Circuit Court of Appeals or in this court, by the learned district judge, no order now known or recognized as comporting with established practice, could well or reasonably be made in remanding *this case to the Circuit Court* for further proceedings.

As the jurisdiction of the Circuit Court of Appeals in the premises was distinctly invoked upon constitutional grounds, the right to have its decision reviewed in this court according to the express terms of the act of 1891 depends upon and must abide the provisions of the last paragraph of section six (6) of that act, viz., such review is matter of right on appeal or writ of error in cases "where the matter in controversy shall exceed one thousand dollars besides costs."

As on the application for the writ of mandamus there was no amount in controversy, writ of error would not lie under this paragraph of the section. It is not for the courts to supply the omissions, casual or otherwise, of the legislature.

Petitioners assert (Petition, p. 18) that "the orders staying proceedings in the Circuit Court and the order of the Circuit Court of Appeals refusing the relief there prayed for are in effect final orders or decisions." If this be true, then petitioners should have gone to the Circuit Court of Appeals by writ of error, and, if further aggrieved by the judgment of that court, they might have come to this court by certiorari under the sixth (6th) section of the act of 1891. Having invoked original action in the Circuit Court of Appeals upon constitutional grounds and upon the theory that such action was by way of aider to the exercise of the appellate jurisdiction of such court, the petitioners should be left to lie where such invocation has caused them to fall. They have dislocated the carefully articulated course of procedure mapped out in and by the act of 1891. The writ of certiorari under the sixth section was not moulded to fit such cases.

In Whitney, Warden, &c., v. Dick, 202 U. S., 132, the jurisdiction of this court appears to have been sustained upon the authority of Re., Chetwood, 180 U. S., 443, but no question appears to have been suggested by the parties there before the court as to the differing qualities of the two classes of certiorari, nor to the fact that the certiorari upon which

the record then before the court had been brought up had been issued under the statute of 1891, while the writ of certiorari which controlled Chetwood's case had been issued in the exercise of the powers conferred upon this court by section 716 of the Revised Statutes of the United States. It occurs to us that the writ of certiorari issued in that case, as well as the one here, were both issued improvidently. If so, should not the writ now before the court be dismissed?

But if we should be mistaken in the above suggestions, and the court should be of opinion that the case here should be retained by it upon the writ of certiorari under the sixth (6th) section of the act of 1891 and upon the record forwarded from the Circuit Court of Appeals, then it is respectfully suggested that no order purporting to direct or control the conduct of District Judge Carland in the future course of the cause could well be issued without said District Judge first being accorded an opportunity to show cause in the premises. In such circumstances, and waiving rules to show cause and the like, we have ventured to submit a true and complete transcript of the record of all the proceedings had in the United States Circuit Court, in the course of which the orders of the learned District Judge temporarily staying further proceedings in the cause in that court were passed. To the contents of that record now upon the files of this court, as we venture to suggest in all fairness, it should have been upon the files of the Circuit Court of Appeals, we respectfully invite attention.

From this complete transcript of the record it appears that after issue had been joined by the filing, on behalf of the McClellans, of a replication to the perfunctory answer of Blackman, as special administrator, and on or about the 24th day of November, 1908, the Attorney General of the State of South Dakota was granted leave to file in the cause a sworn petition in intervention. From this petition it ap-

peared that the deceased, John McClellan, the alleged ancestor of the complainants in the United States Circuit Court, had died intestate in the county of Minnehaha, and State of South Dakota, on or about the 3d day of August, 1899, leaving an estate in said county, as heretofore set forth in complainants' bill of complaint; that under the constitution and laws of the State of South Dakota, in case of the death of a person dying intestate leaving property within said State, and in the event of a defect of heirs, the property of said intestate devolves upon and escheats to the State of South Dakota, and that an action to reduce such property to the possession of the State is capable of being brought by the proper State's Attorney in the State of the Circuit Court of the county wherein said property is situated; that the title to the estate of the said John McClellan, deceased, had failed from defect of heirs, and that the said property had by reason of such failure escheated to the State of South Dakota (page 31); that the county court within and for the county of Minnehaha, State of South Dakota, is a court of probate clothed with jurisdiction to administer the estates of decedents within said county, and that said court had "the sole and exclusive jurisdiction in probate upon the estate of the said decedent"; that petitions had been filed by various persons particularly named, claiming to be heirs-at-law, next of kin, creditors or otherwise, interested in the estate of said John McClellan, deceased, praying for the appointment, either of themselves or of other persons named, as the administrator, general or special, as the case happened to be, of said estate; that pursuant to the petition of one Edward J. Taber, said County Court of Minnehaha county had appointed said Taber as special administrator, and under letters of special administration duly issued to him said Taber took possession of the property and estate of the said decedent, including the property described in complainants' bill of complaint (page 32); that certain other proceedings were had in ordinary course in said County Court, as the result of all of which separate orders were entered by said County Court directing that

notice addressed to the heirs-at-law and next of kin of said decedent, "and all other parties interested in said estate," should be and was duly given by publishing in a newspaper in all respects as provided and required in and by the laws and statutes of the State of South Dakota and the order of said court, and that in pursuance of said notices so given and published a hearing was duly had on or about the 23d day of December, 1899, at which proofs theretofore filed were submitted to the court, and the court, having considered the same, found that certain of the petitioners for letters of administration, commonly referred to as the "Ireland claimants," were entitled to letters of administration on the estate of the said decedent, John McClellan, and thereupon one William Van Eps was duly appointed and qualified as general administrator of said estate (page 35); that thereafter the special administrator, Edward J. Taber, as required by the statutes and laws of the State of South Dakota, delivered to the said William Van Eps as general administrator all of the property of the estate of the deceased John McClellan then in his possession, and the said Taber, as special administrator, was duly discharged from his duties as such; from the order appointing William Van Eps as such administrator certain of the petitioners, whose claims of right to administer upon the estate of said decedent had been adversely decided by said County Court, prayed appeals to the Circuit Court of Minnehaha county, State of South Dakota, which said Circuit Court alone had jurisdiction of appeals from the said County Court in matters pertaining to probate or administration (36), and said appeals were duly perfected and docketed in said Circuit Court of said county; that under the statute and laws of the State of South Dakota said William Van Eps, as general administrator, was without power to distribute any portion of the property of said decedent among his alleged next of kin, if any such should be found and determined to exist, until the final determination by said Circuit Court of such appeals from said County Court.

While these appeals were pending in said Circuit Court, on or about the 24th day of February, 1900, James S. McClellan, one of the complainants named in the bill of complaint, filed in said County Court of Minnehaha County his petition for a revocation of the letters of administration theretofore issued to said William Van Eps and prayed for the issuance of such administration to himself and one Edmund C. Hinde (p. 37), alleging that he, James S. McClellan, was a son of the deceased John McClellan and that the heirs at law and next of kin of said deceased were himself and his brother John C. McClellan and his nephews William, Walter, and Edmund McClellan, sons of a deceased brother William S. McClellan. In his said petition James S. McClellan set forth that he specifically contested the claims of each and every of the other petitioners for letters of administration, whose petitions had been theretofore filed in said County Court; that in pursuance of said petition an order was duly made in said County Court fixing a date for a hearing thereof and directing notice to be given as required by law to all parties in interest, including said William Van Eps, and that in pursuance of said order and notice of hearing, which was duly served upon all parties then in interest, such parties duly appeared in said County Court, and thereafter a large amount of evidence was produced and considered by that court, and it was found therefrom and determined by said court "that the said James S. McClellan was not, nor were any of the complainants" named in the bill of complaint filed in the United States Circuit Court "in any manner whatsoever, related to the said John McClellan, deceased, and were not entitled to any of the relief prayed for in said petition and their said petition was in all things overruled and denied" (p. 38); that thereafter said James S. McClellan perfected an appeal to the Circuit Court of Minnehaha County from said order "overruling and denying his said petition," and said appeal was duly perfected in such manner as to entitle the said James

S. McClellan under the statutes and laws of the State of South Dakota "to a new trial of all the issues involved therein in the said Circut Court"; thereafter, the matter of said petition came on for trial in said Circuit Court of Minnehaha County before said court and a jury "the said James S. McClellan having moved the said court to submit to the determination of a jury all the issues of fact involved in the said several appeals" * * * "all the parties to the said several appeals having appeared and consented" thereto; that one of the issues of fact thus tried and submitted to the said jury "was whether the said James S. McClellan and John C. McClellan * * * were the sons and whether the said William S. McClellan, Edmund McClellan, and Walter McClellan * * * were the grandsons of the said John McClellan deceased," and that in said proceedings all of the above-named "appeared by their counsel Grigsby, Wright & Grigsby and participated in the taking of testimony and in preparing the said cause for trial and became parties to the said proceedings, and that upon the said trial in the said Circuit Court, the said James S. McClellan and the said John C. McClellan and the said William S. McClellan were present in person and testified in behalf of the said petitioner, James S. McClellan"; that a verdict was duly rendered "to the effect that none of the complainants" * * * "were sons or grandsons of the said deceased and that the said Ireland claimants were not the nieces of the said deceased, and that the said Canadian claimants were the brothers and sisters respectively of the said deceased" (p. 39), and judgment was duly entered upon said verdict, which judgment was to the effect that "the petition of the said Canadian claimants should be granted and that the said Cyrus Walts should be appointed as administrator of the said estate"; thereafter, bills of exceptions were duly settled and allowed in favor of the administrator William Van Eps, of the Ireland claimants and of the said James S. McClellan, and upon such bills of exceptions and affidavits as to newly

discovered evidence, motions for a new trial were heard and a new trial was thereafter duly granted by said Circuit Court of Minnehaha County, and said verdicts findings, conclusions, and judgments were each vacated and set aside, and thereafter the matters coming on for new trial in said Circuit Court upon the petition of the Ireland claimants, the Canadian claimants, and said James S. McClellan, and the appeal of said administrator William Van Eps, further testimony was produced in support of the petition of said James S. McClellan and the other parties to said proceedings, as a result whereof it was found and determined by the court that said Canadian claimants were not the brothers or sisters, and that said Ireland claimants were not the nieces, and that the said James S. McClellan and his brothers were not the sons or heirs of the said John McClellan, deceased, and the order of the County Court appointing William Van Eps administrator of said estate was reversed and directed to be set aside "to the end that some person might be appointed administrator of the said estate upon the application of some person or persons authorized to petition therefor"; and thereafter bills of exceptions again having been duly settled and allowed on behalf of the Canadian claimants and the said James S. McClellan, in "affidavits of newly-discovered evidence were duly presented to said court in behalf of the said petitioner James S. McClellan" (p. 40), and the further motions for a new trial based thereon were overruled and denied, and thereafter separate appeals to the Supreme Court of the State of South Dakota were taken and perfected by the said Canadian claimants and the said James S. McClellan, and the same came on for hearing in said Supreme Court at the October, 1902, term thereof, and after being heard "said Supreme Court duly affirmed the order of the said Circuit Court denying the said separate motions of the said Canadian claimants and the said petitioner James S. McClellan for new trials therein," and *"it was ordered and directed that in all further proceedings in the said Circuit Court and the said County*

Court in the said matter of the said estate of the said John McClellan, deceased, and until the property belonging to the said estate should be lawfully distributed as provided by law the State's attorney within and for the said county of Minnehaha should be given notice of all further proceedings in relation to the said estate; that thereafter a petition for a rehearing was duly filed in said Supreme Court by James S. McClellan, "a copy of which was duly served upon said State's attorney and upon the attorney general of the State of South Dakota," and a rehearing was thereafter granted by the said Supreme Court to the said James S. McClellan, it being provided in the order granting the same *"that all abstracts and briefs should be served upon the attorney general of the State of South Dakota and the said State's attorney within and for the said county of Minnehaha"*; upon said rehearing, at the April, 1907, term of said court, "said attorney general of the State of South Dakota and the said State's attorney" appeared (p. 41) therein "in behalf of the said State of South Dakota" and filed briefs; that thereafter, said Supreme Court reversed the order of the Circuit Court of Minnehaha County and ordered "that a new trial upon the said petition of the said James S. McClellan be granted"; and in pursuance of said order of the State Supreme Court, on the 11th day of February, 1908, said State's attorney *"presented to the said Circuit Court an information and petition on the part of the State of South Dakota setting out in substance the facts hereinbefore recited and praying that he be granted leave to file his information and petition in the said matter in the said Circuit Court, and setting out and alleging in the said information and petition that there is a defect of heirs of the said John McClellan, deceased, and that he left no one capable of succeeding to the said estate, and that the said estate had devolved and escheated to the said State of South Dakota, and praying that leave be granted to him to intervene in the said matter,"* further "reciting and alleging that the said James S. McMillan was not, in

any manner whatever, related to the said deceased"; and praying "that the said State of South Dakota might be permitted to contest the petition of the said James S. McClellan"; *"that upon the hearing of the said petition and motion, leave was granted to the said State's attorney to file the said petition and to present the said evidence";* that upon the said new trial of the said petition of said James S. McClellan the interests of the State of South Dakota were represented by the attorney general of the State, by said State's attorney, and by special counsel; that thereafter upon said petition of said James S. McClellan, he appearing by his attorneys Grigsby & Grigsby, and upon the evidence produced by the said James S. McClellan and by the said State of South Dakota it was found and determined by said Circuit Court (p. 42) "that the said James S. McClellan and John C. McClellan were not the sons and that the said William S. McClellan, Walter McClellan, and Edmund McClellan were not the grandsons of the said decedent," and it was adjudged and determined that the persons so named were "not the heirs at law or next of kin of the said decedent and are (were) in no manner related to said decedent and are (were) not entitled to have administration granted upon the petition of the said James S. McClellan," and it was further directed "that said cause be remitted with the files therein to the said County Court for all further proceedings in the administration of said estate, including the appointment of a general administrator thereof and directing that letters of administration be issued therein as provided by law; that upon the said new trial so had in the Circuit Court the special administrator George T. Blackman, appeared by his counsel Sioux K. Grigsby, "who was one of the members of the said firm of attorneys Grigsby, Wright & Grigsby and is one of the attorneys for the complainants" in the United States Circuit Court, and became a party to said proceedings, "and in open court announced his readiness and willingness to abide the order of the said court in the said matter."

That said George T. Blackman was duly appointed as special administrator of said estate upon the death of said William Van Eps; that during or about the month of December, 1899, an order or direction was made in the said County Court by the judge thereof, designating said Sioux K. Grigsby above mentioned "as an agent or attorney for unknown or non-resident heirs, with certain limited powers and duties specified in the said order, and that after the death of the said William Van Eps the said Sioux K. Grigsby, purporting to act as the attorney for unknown and non-resident heirs of the said decedent, filed a petition in the said County Court" praying the appointment of the said George T. Blackman as special administrator of the said estate, and "upon the said petition such proceedings were had in the said County Court that an order was made designating and appointing the said George T. Blackman as such special administrator on the 17th day of September, 1906;" that said Blackman did thereafter qualify as such special administrator, it being further alleged "upon information and belief that the said Grigsby & Grigsby, in various matters pertaining to the administration of the said estate (p. 43) since the same passed into the hands of the said special administrator, have acted as counsel for the said special administrator; and it was further alleged that none of the material facts above set forth with reference to the said proceedings which had been in the County, Circuit and Supreme Courts of the State of South Dakota were either set forth in complainants' bill of complaint or the defendant Blackman's answer thereto, and that no notice of any such proceeding had been given by said special administrator or by his counsel or the counsel for the complainants therein "to the said State's attorney, the said attorney general, or their said special counsel;" that the rights and interests of the said State of South Dakota were liable to be affected by the proceedings in said Circuit Court of the United States, and that it is necessary for the protection of the rights of

said State "that leave be granted to it to intervene herein and to file this its petition in intervention and to require the said complainants to answer to the same" (p. 44).

To such petition of the State of South Dakota for leave to intervene in the cause the complainants, the Messrs. McClellan, by the solicitors of record, Messrs. Grigsby & Grigsby, showed cause, asserting that the State of South Dakota, and not "made, stated, or established such a cause as doth or ought to entitle said State to any such order or relief as is hereby sought or prayed for, from or against these complainants or either of them, and that said petition in intervention is wholly and entirely without equity," and that the petition does not show that the State of South Dakota "has any interest in the matter in litigation of such a direct and immediate character that it will either gain or lose by the direct operation and effect of the decree of this court in this suit" (p. 54).

The affidavit of Melvin Grigsby, attached to said complainants' return to the rule to show cause why the State of South Dakota should not be permitted to intervene in the proceedings in said court, does not negative in any material particular the statement of facts made in and by the sworn petition for leave to intervene.

Upon this petition for leave to intervene and the return of the complainants, the Messrs. McClellan, thereto, the learned district judge found that—

> "the petition on file does not show any adjudication of any court vesting the title to said property in the State. No such adjudication can be made until some action is brought by the State to which all the world may be said to be parties and the claim of the State that John McClellan died intestate without heirs, established therein.
>
> "It is not necessary to determine the question on this motion as to whether under the laws of South Dakota, title vests immediately in the State upon the death of an intestate without heirs, or whether an

> action in court is necessary to so vest it, as in either event when the State seeks to assert its title, it must present some legal evidence of it. * * * This is a proceeding in equity, however, and the court must act accordingly in view of the facts disclosed by the petition. The order will be that the motion to intervene be denied and the prosecution of this action be stayed for the period of ninety days to allow the State to commence a proper action to establish its title. In the event that such action is commenced within such period, this action will be further stayed until the determination of said action brought by the State. If no such action is commenced as herein specified, then this action shall proceed as equity and justice may require" (p. 60).

Subsequently it was made known to the Circuit Court of the United States that the State's attorney for Minnehaha County had, pursuant to the "act of the legislature of the State of South Dakota, designated and known as 'Senate Bill Number 262,' " commenced in the Circuit Court for Minnehaha County, South Dakota, an action wherein the State of South Dakota was complainant "and Edward J. Taber, and all other persons known to have heretofore made, and all other persons known to be now making, claim to any right, title, or interest in the estate of the said John McClellan, deceased, and all unknown persons having or claiming to have any such right, title, or interest, whether such known or unknown persons be alleged creditors, heirs-at-law, next of kin, or to otherwise claim any interest in the said estate, are designated and named as defendants," * * * "and that pursuant to the terms and provisions of the said act of the said legislature * * * summons is now in process of publication in a newspaper designated by the order of the said Circuit Court" (p. 64).

Thereupon the Circuit Court of the United States entered its further order staying the further prosecution of the case then pending in that court "until the determination of that

certain action now pending in the Circuit Court within and for the county on Minnehaha in the State of South Dakota, wherein the State of South Dakota is complainant and Edward J. Taber and other persons therein designated by name as defendants and all persons unknown having or claiming to have any right, title, or interest in and to the estate of the said John McClellan, deceased, are also defendants, has been determined, *or until the further order of the court herein*" (p. 65).

Subsequently there was filed in said cause in the Circuit Court of the United States the affidavit of Mr. Melvin Grigsby, "a member of the firm of Grigsby and Grigsby, solicitors and of counsel for complainants," in the suit pending in said cause, which affidavit recites at great length much of the contents of the sworn petition of the State of South Dakota for leave to intervene, hereinbefore referred to and quoted from at length. In concluding said affidavit, which refers with particularity to the decisions of the Supreme Court of the State of South Dakota rendered in the course of the proceedings in connection with the estate of John McClellan, deceased, and reported in volumes 107 and 111 of the Northwestern Reporter at pages 681 and 540 thereof respectively, affiant prayed "that an order may be issued and directed to the said State of South Dakota requiring the said State to show cause" * * * "why the said order staying further proceedings in this suit should not be vacated and set aside and why this suit should not proceed immediately to a speedy hearing and determination of the same" (pp. 66-71).

Upon the strength of this affidavit and prayer, an order to show cause having been entered and duly served upon the State of South Dakota and the Attorney General thereof, cause was shown by U. S. G. Cherry, special counsel for the Attorney General of the State of South Dakota, and the State's attorney within and for the county of Minnehaha in the action of McClellan and others *vs.* Blackman, special

administrator, etc. Mr. Cherry, in the course of his statement under oath, specifically called attention to so much of the decision and order of the Supreme Court of the State of South Dakota, filed on or about the 3d day of April, 1906, as directed that "in view of the peculiar circumstances surrounding the estate involved in this proceeding, it will become the duty of the court having it in charge to insist upon the most efficient and honest administration until the property belonging to it shall have been lawfully distributed, and the State's attorney of Minnehaha county should have notice of all further proceedings in relation thereto. Rev. Civ. Code 1903, section 1111," and also specially called the attention of the court to the fact that "the county court within and for the county of Minnehaha, being the court of probate and having jurisdiction of the matter of the estate of the said John McClellan, deceased, deeming it necessary and advisable that an attorney be appointed to represent and care for the interests of such unknown non-resident heirs and other parties, not before the court, and to protect such rights or interests of such unknown non-resident heirs as might thereafter be determined upon," had appointed Sioux K. Grigsby as the attorney for all such unknown and non-resident heirs or claimants, and that thereafter and "by reason of such appointment of the said Sioux K. Grigsby as such attorney for unknown and non-resident heirs," "said James S. McClellan, in his own behalf and in behalf of the other complainants herein," applied to the said Sioux K. Grigsby and procured him or the firm of Grigsby, Wright and Grigsby, of which the said Sioux K. Grigsby was a member, to prepare and file his petition for revocation of the letters of administration theretofore issued to William Van Epps, and that thereafter and—

> "upon the trial of the said matter in the said (county) circuit court before the said Charles S. Whiting as judge of the said court, in February, 1909, the said James S. McClellan was present as a witness and testified and * * * stated under oath as a witness

that in employing the said firm of Grigsby, Wright and Grigsby and in prosecuting his petition and claim to the said estate, he was in fact authorized to act for and did act for each and all of the complainants herein, and that prior to employing the said Grigsby, Wright and Grigsby, he had communicated by mail with each of the said complainants and that they had authorized him to employ counsel and to prosecute their claims to the said estate" (p., 81).

That

"Said George T. Blackman, the sole defendant herein, was duly appointed upon the said petition of the said Sioux K. Grigsby as special administrator of the said estate, and qualified as such, and letters of special administration were so issued to him out of the said court, and he thereupon entered upon the discharge of his duties as said administrator, and is now acting as such, and *that at all times since the appointment and qualification of the said George T. Blackman as such special administrator, the said Grigsby and Grigsby have been his attorneys and counsel in the matter of the discharge of his duties as such special administrator, and are now acting as such counsel, and were acting as his counsel and attorneys at the time this suit* (in the Circuit Court of the United States) was commenced, and that the answer of the said George T. Blackman in this suit as filed herein, to which reference is hereby made, sets out none of the substantial or material facts set forth in the petition filed herein by the State of South Dakota for leave to intervene in this suit, *and that to permit this cause to proceed to a trial upon the bill of complaint of the said complainants herein and the answer of the said specal administrator would result in a mere sham defense, as this affiant is informed and verily believes, to the matters set forth in the bill of complaint herein.*

"That upon the trial of the said cause in the said Circuit Court within and for the said county of Minnehaha in the State of South Dakota, before the said Charles S. Whiting as judge * * * a final judgment was entered in which it was adjudged and de-

> termined that the said James S. McClellan and his said co-complainants herein, are not the sons of or in any manner related to the said John McClellan, deceased, and that the said judgment has not been reversed or modified, but is in full force and effect, but that a proposed bill of exceptions has been prepared and served by said Grigsby and Grigsby, as attorneys for the said James S. McClellan" (p. 82).

upon which a further appeal to the Supreme Court of the State of South Dakota is still pending.

Upon consideration of the foregoing the Circuit Court of the United States refused to modify or otherwise disturb its orders theretofore entered, staying proceedings in the cause.

From all of the foregoing it appears that James S. McClellan in his own right and on behalf of his co-claimants invoked the jurisdiction of the proper courts of the State of South Dakota to determine the very matter, namely, the question of his and their relationship to John McClellan, deceased. Under section 80 of the Probate Code of South Dakota, "administration of the estate of a person dying intestate * * * must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order, that is to say.

a. The surviving husband or wife.

b. The children.

* * * * * *

f. The grandchildren.

g. The next of kin entitled to share in the distribution of the estate.

h. The creditors.

i. Any person legally competent."

The refusal of the county court of Minnehaha County to appoint James S. McClellan or any of his co-claimants administrator of said estate carries with it, at least by necessary implication, the finding that none of said petitioners were

either the sons of grandsons as alleged of said John McClellan, deceased.

It has been frequently decided heretofore that where the order or judgment of a State court in proceedings for administration depends upon the question as to whether the party claiming the right to administer such estate is next of kin or heir at law of the intestate, such order or judgment is conclusive upon that question until vacated or reversed in any and all subsequent suits or proceedings, whether in the State or federal courts. Such order or judgment until vacated or reversed is pleadable in bar and as *res adjudicata* in such subsequent proceedings.

In Caujolle *vs.* Curtiss, 13 Wallace, 465, this court said:

> "But if there be next of kin, and no personal disqualifications attach to them, the surrogate can exercise no discretion on the subject. The inquiry becomes then a matter of right and is, by the express language of the statute to be determined by the right to the succession. In the absence of personal disqualifications, as we have seen, it is compulsory on the surrogate to grant the letters to the party to whom the inheritance belongs. This is the primary and only object of inquiry, in order to ascertain to whom the letters should be issued. The illegitimacy of Ferrie in any other view was an immaterial issue. It is personal good conduct and not the status of birth which constitutes a man a fit person to be intrusted with the duties of administration. It is idle therefore, to suppose that this contest was inaugurated and carried on, on any other theory than that the result of it settled the right to the estate. Because an administrator can, under certain circumstances, be appointed, who is not connected by kinship with the intestate, proves nothing. It is enough to say there was no occasion for the surrogate to do this, and his action was not grounded on his ability to do it in certain contingencies. His power was invoked under that clause of the statute which directed him to issue letters, in case there were relatives, to the one to whom

the estate went, by the law of descent. Ferrie alleged himself to be that person, because he was the son of the deceased. These appellants said: Not so, for you are illegitimate, and have no inheritable blood, and we propose to try that question, and if it is decided in our favor, we get the estate, as we are, confessedly, in that event the nearest of kin. The issue thus solicited was framed; voluminous evidence both from abroad and at home taken upon it; able arguments heard; elaborate opinions given, and repeated decisions made against the right set up by these appellants, and yet they are not content. Beaten in the State courts on the vital question—the illegitimacy of Ferrie—they turn to this court to try over again the very point decided against them. Can they do this? They say the point was only cognizable incidentally; but how can this be, when the surrogate could not have done the thing he did do without deciding it? It had to be decided in order to determine to whom the letters should issue, and the decision of it, of necessity, settled the distribution of the estate. If this litigation can be renewed in a separate suit for distribution in another court, then the same persons can try the same question, in respect to the same subject, in two different suits. The question before the surrogate was the legitimacy of Ferrie and the subject in which it was necessary to decide it, was the distribution of the estate. That the ultimate right of property was the pivotal point of the case appears by the decree itself, but it finds Ferrie to be the legitimate son and so nearest of kin of the intestate, and by reason of this directs administration to be granted to him. And it goes further, for it finds, substantially, that the contest was made on the question of kinship alone, and denies the things set up by these appellants. Suppose the suit for distribution had been brought in the surrogate court; can there be a doubt that the decree granting administration to Ferrie would be pleadable in bar to it? If such be its effect in that court, can or ought it to have a different effect in another court of concurrent jurisdiction? If so, then instead of there being uniformity in the exercise of concurrent jurisdiction, there would be

conflicting determinations, and the evils resulting from such a course of procedure can be easily foreseen. Neither the policy of the law nor the interests of society require this to be done.

* * * * * * *

"We are not aware of any decisions directly upon this subject in any of the State courts of this country. This, doubtless, results from the fact that, with us, estates are settled and distributed in the same courts that grant the letters of administration. It seldom occurs here that separate suits for distribution are instituted at all, and very rarely, anywhere else than in the courts of probate. A recent case in this court, of Blackburn *vs.* Crawfords, 3 Wall., 125 (70 U. S., 18-186) is, in some of its features, unlike this, but the principle of that case would seem to create an estoppel in this on principle and authority, therefore, the judgment in the suit for administration in New York was pleadable in bar to this suit, and on that ground alone, the bill should have been dismissed."

In Howell *vs.* Budd, 91 California, 342, the Supreme Court of California said:

"We conclude therefore, that the judgment to be rendered by the court upon the hearing of the petitioner's application for letters of administration (subject to appeal) will determine for all time and in all courts, as far as the parties to the proceeding are concerned, whether the petitioner is the child of said Johnson, deceased, and therefore entitled to all of his estate to the exclusion of kindred of the collateral line, or whether Kay, the administrator, and other collateral kindred, are next in the direct line of succession and are entitled to the whole of the estate of the said deceased."

Construing section 5651 of the Compiled Laws of South Dakota, same being section 26 of the Probate Code of that State, the Supreme Court of South Dakota has declared that:

"The effect of this section (Prob. C., sec. 26) if the law were not so before, is to make the county court,

when acting as a probate court and in respect to probate matters, a court of general jurisdiction with the same presumptions in its favor as in the case of ordinary courts of general jurisdiction; that is, the subject of the action being one properly cognizable in such court, it will be presumed that the court in a legal manner obtained and had jurisdiction to pronounce judgment."

Matson *vs.* Swenson, 5 South Dakota, s. c., 58 Northwestern R., 570.

In Woerner on Administration, 2d ed., p. 1234, the general rule is stated thus:

"It has been held that where the right to administer is contested on the application for letters, the sole issue being the degree of relationship of the parties to the decedent, the determination of the court as to pedigree in such contest is conclusive upon the parties in the subsequent distribution of the estate, but such decree does not affect parties not cited who did not appear on the application for letters."

Citing—

Howell *vs.* Budd, 91 California, 342.
Cawjolle *vs.* Curtiss, 13 Wallace, 465.

Matters of administration affecting decedents' estates in the courts of South Dakota are proceedings *in rem*. The estate having passed into the control of an administrator, whether general or special, is not only under the control, but is in the actual custody, of the court of probate itself.

This court, in Byers *vs.* McAuley, 149 U. S., 608, speaking through Mr. Justice Brewer, established the general rule applicable to such a case in the following terms:

"It is a rule of general application, that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. The doctrine has been affirmed again and again by this court.

> * * * An administrator appointed by a State court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is in possession of the court and it is a possession which cannot be disturbed by another court. * * * There is nothing in any decision of this court, controverting the proposition thus stated, that the administrator is the officer of the State court appointing him, and that property placed in his possession by order of that court is in custody of the court."

And again in O'Callaghan *vs.* O'Brien, 199 U. S., 89, the court, speaking through Mr. Justice White, said:

> "The issue first for decision is, Did the Circuit Court of Appeals rightly hold that the Circuit Court was without jurisdiction of the case made by the bill? The solution of the question is not free from complexity. Original reasoning is not, however, required, since the subject has been previously considered by this court. We come, therefore, to an analysis of the leading cases. It results from the analysis which we have made of the bill that by necessary effect it assailed the previous probate and the existence of the will, and, besides, under the hypothesis that a will and probate might be found to exist, sought to limit the operation and effect of the will. The subject, therefore, has a twofold aspect, the power of Federal courts to entertain jurisdiction concerning the probate or the revocation of the probate of wills, where the requisite diversity of citizenship exists, and the power of those courts, where such diversity obtains, to adjudicate concerning rights against the estates of decedents."

Reviewing the decisions of this court from Hook *vs.* Payne, 14 Wallace, 253, to and including Byers *vs.* McAuley, *supra*, the learned justice continues as follows:

> "Let us, then, first deduce the principles established by the foregoing authorities as to the power of a court of the United States over the probate or revocation of the probate of a will. An analysis of the cases,

> in our opinion, clearly establishes the following: First. That, as the authority to make wills is derived from the State and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States. Second. That where a State law, statutory or customary, gives to the citizens of the State, in an action or suit *inter partes,* the right to question at law the probate of a will or to assail probate in a suit in equity the courts of the United States in administering the rights of citizens of other States or aliens will enforce such remedies."

And after having reviewed the constitution and laws of the State of Washington, whence the case before the court came, the opinion concludes as follows:

> "It follows that as the Circuit Court of the United States had no jurisdiction to admit a will to probate, or to entertain a pure probate proceeding, and as the remedy afforded by the laws of Washington to secure the probate or the revocation of the probate of a will were proceedings of a purely probate character, and not an action or suit *inter partes,* the Circuit Court of Appeals correctly decided that the Circuit Court, although there was diversity of citizenship, was without jurisdiction of the cause so far as the bill sought a declaration of the non-existence of a will and the consequent nullity of the probate."

There is no custom, decision or statutory provision in South Dakota whereby a right of action exists in favor of an heir, devisee or legatee to recover his portion or share of an estate, against an administrator, independent of a proceeding either direct or ancillary in probate. A suit *inter partes* between the administrator and the heir, devisee or legatee is not provided for. It is the law and one of the conditions of title or right to the property of a decedent that final distribution must be made in the probate court before

the heir, devisee, legatee, or person entitled to the estate can recover it.

County courts of South Dakota are by the constitution of that State courts of record, and are given original jurisdiction in all matters of probate.

State Constitution, Article 5, sections 1-20; Pol. Code, Sect. 674; Code Civ. Pro., 18, 19.

The jurisdiction of the county courts in all matters of probate is exclusive and original.

Prob. Code., Sec. 2, 16.

In the exercise of probate jurisdiction they are empowered to grant letters of administration, to compel administrators to render accounts, to order and regulate all distributions of property or estates of deceased persons, to exercise all the powers conferred by the probate code and to make such orders as may be necessary to exercise the powers conferred.

Prob. C., Section 25.

The jurisdiction of the county court is coextensive with the State courts in the settlement of the estate of a decedent and the sale and distribution of his real estate.

Prob. C., Sec. 33.

The way in which administration must be granted to persons claiming to be entitled is fixed by statute.

Prob. C., Sec. 80.

And a contest between claimants on the issue of heirship is conclusive in all subsequent stages of the probate proceeding and in all other courts.

Any person interested may contest a petition for administration, asserting his own rights thereto and his procedure in such contest is prescribed by statute.

Prob. C., Secs. 89, 90 *et seq.*

If letters of administration have been granted to a person not entitled thereto, the person entitled to the same may procure their revocation.

Prob. C., Secs. 95-98.

The administrator is chargeable in his own account with the whole of the estate which comes into his possession.

Prob. C., Secs. 272-279.

When settlement is made, notice is given and all persons interested may contest and on the settlement of the final account, distribution is made "to all entitled thereto."

Prob. C., Secs. 283-286.

Upon the settlement of the accounts, the estate is distributed "among the persons who, by law, are entitled thereto." This distribution may be made upon the petition of the administrator or of any heir, legatee or devisee.

Prob. C., Sec. 307.

In the order or decree distributing the estate the court must name and the persons and proportions or parts to which each is entitled and thereupon, but not before, such persons may demand, sue for and recover their respective shares from the administrator or any person having the same in possession but "such order or decree is conclusive as to the rights of the heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal."

Prob. C., Sec. 308.

All issues of fact joined in the county court in probate matters are tried by the court and in all such proceedings the party affirming is plaintiff and the one denying or avoiding is defendant. After the hearing, the court must give in writing, its findings of fact and conclusions of law and judgment, and orders may be entered and enforced in the same manner as in other courts.

Prob. C., Sec. 340.

Upon the filing of a petition for administration, notice must be given as provided by the statute and this notice is binding upon the whole world and confers upon the court jurisdiction over the *Res.*

Prob. C., Secs. 88-93-39-42, 341.

Appeals may be taken to the Circuit Court, either upon the questions of law alone, or upon the whole case. Prob. C., secs. 345, 358, 359.

Upon such appeal, if the same be taken upon questions of both law and fact, the whole case is tried *de novo* and the Circuit Court proceeds in all respects the same as if the proceeding, in the first instance, had originated in that court, and, if the appeal be upon the appointment of an administrator, that court appoints and designates such officer.

Engle *vs.* Yorks, 7 South Dakota, 254.

Green *vs.* Sabin, 12 South Dakota, 496.

In case of an appeal from a decree or order granting letters of administration, such appeal does not stay the issue of letters where, in the opinion of the court, manifested by an entry upon the minutes of the court (as was done in this case), the preservation of the estate requires that such letters should issue. But, in that case, the letters so issued do not confer power *to distribute the property of the decedent until the final determination of the appeal.* Prob. C., sec. 355.

Upon the death of an intestate his property, both real and personal, passes to his heirs, *subject to the control* of the county court and to the possession of any administrator appointed by that court for the purpose of administration. Civ. C., sec. 1093.

If there is no one capable of succeeding, under the statutes, controlling succession (Civ. C., secs. 1092-1110) and the title fails from a defect of heirs, the property of a decedent *devolves and escheats* to the State, and an action for the recovery of such property and to reduce it into the possession

of the State or for its sale and conveyance may be brought by the State's attorney *in the Circuit Court of the county or judicial subdivision in which the property is situated.*

From the foregoing it seems apparent that it is a law and rule of property ~~in~~ the State of South Dakota that the order or decree of the probate court must name the persons and the proportions or parts to which each are entitled before any right of action accrues in favor of an heir, devisee, or legatee to recover from an administrator, and that it is a like law and rule of property that the final order and decree is conclusive as to the rights of heirs, legatees, or devisees and can only be reversed, set aside, or modified on an appeal, and that no suit *inter partes* in any court of the State is provided for other than a direct or ancillary proceeding in probate court.

Carrau *vs.* O'Calligan, 125 Fed., 657; s. c., 60 C. C. A., 347.

Richardson *vs.* Green, 61 Fed., —; 9 C. C. A., 565.

A special administrator, under the provisions of the Probate Code of South Dakota, is required to forthwith deliver to the administrator, upon the appointment and qualification of the latter, the entire estate of the decedent in his hands. The special administrator simply holds the estate for the general administrator. Special administrators are not subject to be sued by a creditor on a claim against the decedent. Such administrators have no powers except such as are specified in the statute and in their letters of administration. Those powers, such as they are, cease upon the appointment and qualification of a general administrator and the special administrator forthwith must account to the court, out of which his letters have issued. Prob. C. Sections 119-125. This law of the State, as well as all other statutes and laws of the State pertaining to probate, are not merely rules of practice for the courts, but are laws limiting the rights of parties and must be

observed by the Federal courts in the enforcement of individual claims of right.

Byers *vs.* McAuley, 149 U. S., 608.

MERITS.

The Federal Circuit Court was without jurisdiction to entertain this action for lack of indispensable parties. To a suit in a Federal court, brought to establish claim of heirship to a decedent, all persons claiming to be sole heirs or to be entitled to the estate adversely to the complainants and *who have asserted their claims by appropriate proceedings in the probate court are indispensable parties.*

Carrou *vs.* O'Calligan, 125 Fed., 657.

The Supreme Court of the State of South Dakota made the State a party to the probate proceedings by directing that the State's Attorney of Minnehaha County should have all further proceedings in relation to the estate. 107 North Western Rep., 681. In the subsequent rehearing in that court the State appeared and was represented by its Attorney General and the State's Attorney of said county. 111 North Western Rep., 541. And in the retrial in the Circuit Court, the State had formally appeared, alleged that the estate had escheated; that the McClellans were not heirs, and the State courts had so found the facts to be. The State of South Dakota by such proceedings became a party adverse to the complainants, McClellans, and it thereby became and was an indispensable party to any proceeding either in the Federal or other State courts, which were calculated to raise anew the issues involved in the claim of the McClellans to be recognized as heirs of the deceased.

It is not understood that any of the principles above asserted and here contended for are, in substance at least, controverted by what has recently been decided by this court in Waterman *v.* The Canal-Louisiana Bank, &c., Company,

Executor, 215 U. S., Part I, p. 33. In the present case, as in Waterman's case, the bill of complaint and the scope of its prayers are broader than the acknowledged and determined jurisdiction of the Circuit Courts of the United States either warrant or will sustain.

In the Waterman case, when the scope of the bill was narrowed as required by this court, there was no longer any question of pure probate involved. In the case at bar, as in the case of Farrell *v.* O'Brien (O'Callaghan *v.* O'Brien), 199 U. S., 89, the true issue for decision was and is in essence an issue of pure probate. In the latter case the object of the bill was to set aside the probate of a will; in the case at bar, being a case of intestacy, the claim of sole heirship necessarily involved under the laws of South Dakota the right to letters of administration, and to have the same issued to whomsoever might be declared to be heir. This was matter of pure probate, over which the Federal court had no jurisdiction. The fact that the complainants in their bill of complaint *ex industria* omitted any reference to letters of administration, though most carefully specifying and praying relief in manner and methods peculiarly incident to the settlement of decedents' estates by courts of probate, does not alter the truth of the matter. This court will look through form to substance, and if it has the power which it exercised in Waterman's case, to read out of the prayers of the bill of complaint concrete matters, in order to sustain the Federal jurisdiction, it must likewise have power to read into such prayers matters of substance necessarily implied though not mentioned therein, even though such reading in results in ousting the Federal jurisdiction.

In the Waterman case no indispensable party was wanting. In the present case, by virtue of the proceedings in the State courts, to which the McClellans were and are still parties, the State of South Dakota was not only a proper, but it was an indispensable party to the action in the Federal court.

The Circuit Court of the United States for the District of South Dakota, upon the petition of the State for leave to intervene in the case, that court should either have granted such leave or should have dismissed the bill of complaint. The failure of the Circuit Court to do either is a matter of which the petitioners here could not complain. If it would not be open to them to complain had their bill of complaint been dismissed, are they entitled to the more sympathetic consideration and treatment because the learned district judge holding the Circuit Court saw fit to retain their bill of complaint but refused to permit the processes of his court to suffer abuse through a collusive or, at least, improvidently defended contest.

The application of the State of South Dakota for leave to intervene in the Circuit Court of the United States was in accord with the usage sanctioned by prior rulings of this court.

Gumbel *v.* Pitkin, 124 U. S., 143.
Krippendorf *v.* Hyde, 110 U. S., 276, 283.
State of Florida *v.* Georgia, 17 Howard, 478.

In Gumbel *v.* Pitkin, *ubi supra,* this court, referring to the case of Paradise *v.* Farmers & Mechanics' Bank, 5 La. Ann., 710, quoted therefrom at great length, and in part as follows:

> "We have uniformly discountenanced all attempts, in whatever form they may be made, of making our courts instruments for defeating the action of courts of other States on property within their jurisdiction by means of clandestine or forcible removal to this State. The only decree which we render in such cases is that of immediate and prompt restitution, or one preventing any rights to be acquired by these attempts to defeat the ends of justice. This is an answer to the question raised concerning the peculiar right of the creditor. The only right which he in any event could reach would be subordinate to the

> injunction from the operation of which this property has been attempted to be removed. Not only on general principles, but on the cases cited by the learned judge, who decided this case, the claim of the plaintiff to subject this property to attachment is without the shadow of right."

In whatever light it may be viewed, the attempt of the McClellans, when already parties to a proceeding in a State court of competent jurisdiction, having possession of the *res*, to escape the effects of an existing judgment adverse to their contentions and claims, by invoking the alleged concurrent jurisdiction of the Federal Circuit Court, is open to question; when considered in the light of their evident intention to evade the orders of the State court requiring notice of all action in furtherance of their contentions to be given to the State or its proper law officers, it would seem to be open to serious criticism; and when viewed in the light of the totally inadequate answer filed by the defendant Blackman, it would seem to be subject to grave censure.

The bill of complainant as drawn, considered in the light of the scope of its prayers, is clearly beyond the jurisdictional powers of the circuit court of the United States (Waterman *v.* Canal-Louisiana, &c., Co., 215 U. S., —).

If stripped of all demands against the special administrator for accounting, distribution, and injunction *pendente lite*, it presents no matter of equity or equitable cognizance.

If the claimants be heirs of the deceased John McClellan, as is averred, their right, if any there be against the administrator in the Federal court, is at law and not in equity.

In either event, and as well for the want of an indispensible party—the State of South Dakota, as above noted—the Circuit Court of the United States for the District of South Dakota is without jurisdiction to proceed with the cause

otherwise than by dismissing the bill of complaint for want of jurisdiction.

Upon the whole case it is respectfully submitted that—

(1) the writ of certiorari herein should be dismissed as having been improvidently issued; or

(2) the order of the circuit court of appeals denying the application for a writ of mandamus and dismissing the same should be affirmed; or

(3) said order of the circuit court of appeals should be reversed and the cause remanded to the circuit court of South Dakota with instructions to dismiss the bill of complaint at complainant's costs.

FREDERICK D. McKENNEY,
For John E. Carland, District Judge,
Appearing Specially.

S. W. CLARK,
Attorney General of South Dakota,
U. S. G. CHERRY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, ET AL., PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SPECIAL APPEARANCE OF JOHN E. CARLAND.

Now comes John E. Carland, United States District Judge for the District of South Dakota, by Frederic D. McKenney, and expressly excepting to the jurisdiction both of this Honorable Court and of the United States Circuit Court of Appeals, to grant the relief prayed by the petitioners above named in the premises, enters this his special appearance in the above-entitled proceeding and files herewith his affidavit and Exhibit A therein referred to.

FREDERIC D. McKENNEY,
Attorney for John E. Carland, United States District Judge for South Dakota, Appearing Specially.

Supreme Court of the United States, October Term, A. D. 1909.

No. 630.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClelland, Petitioners,

vs.

JOHN E. CARLAND, United States District Judge for the District of South Dakota.

UNITED STATES OF AMERICA,
State of South Dakota, County of Minnehaha, ss:

John E. Carland being first duly sworn deposes and says: That he is the defendant in the above entitled matter; that he has not now and never has had any interest in the said matter, or in any of the matters hereinafter referred to, except in his official capacity as Judge of the said United States District Court within and for the said District of South Dakota, and in his capacity while acting as Circuit Judge in said District; that on the 8th day of September, 1908, there was filed in the Circuit Court of the United States, in and for the Southern division of the District of South Dakota, a bill in equity, wherein the above mentioned petitioners were complainants, and George T. Blackman, as Special Administrator of the estate of John McClellan, deceased was the sole defendant, and that there is hereto attached, marked Exhibit "A" and hereby referred to, a duly certified copy of all the records and files, with the exception of the obligation for costs, had in the said cause, the same being certified by Oliver S. Pendar the duly qualified and acting Clerk of the said Circuit Court; which certified copy includes among other things, a copy of the said Bill of Complaint in Equity, the Answer of the said defendant George T. Blackman, as Special Administrator of the said estate of the said John McClellan, deceased, the Replication of the said complainants therein, the Order of the said Circuit Court on the petition of the State of South Dakota for leave to file petition in intervention, the Petition in Intervention filed by the said State of South Dakota, pursuant to the said last mentioned Order, wherein is recited various facts relative to the proceedings theretofore had in the State Courts in various suits and proceedings between the said above mentioned petitioners, or some of them, and the said State of South Dakota and other persons, the Return of the said above mentioned petitioners to the Order to Show Cause issued in the said Circuit Court of the United States within and for the said District of South Dakota upon the said petition of the said State of South Dakota for leave to intervene, the memoranda opinion of this affiant as Judge of the said Court upon the hearing of the said petition for leave to intervene, and the return to the said Order to Show Cause, the Order made upon the return to the said Order to Show Cause, the affidavit of George J.

Danforth, as State's Attorney within and for the County of Minnehaha and State of South Dakota, relative to a suit pending in the Circuit Court of the State of South Dakota against the said petitioners herein, the said Special Administrator and all persons unknown, under the statutes and laws of the State of South Dakota, relative to escheats, the Order of the said Court staying proceedings in the said cause in the said Circuit Court of the United States for the District of South Dakota, the Affidavit of Melvin Grigsby upon an application for an Order to Show Cause why the said last mentioned order staying proceedings should not be vacated and set aside, Order to Show Cause, granted upon the said last mentioned affidavit and other proceedings, Affidavit of U. S. G. Cherry, in opposition to the said last mentioned affidavit and order to show cause, and Order made by this affiant as Judge of the said Circuit Court within and for the said District of South Dakota upon the last aforementioned Order to Show Cause.

This affiant further states that any proceedings which may have been had in the Circuit Court of Appeals within and for the said Eighth Judicial Circuit in an application or proceeding by the said above mentioned petitioners against this affiant, as Judge of the said District Court for a writ of mandamus or for other mandate or relief therein, was wholly ex parte, and that this affiant did not appear therein, and was not represented, and had no knowledge of any of the said proceedings until long after the termination thereof in the said United States Circuit Court of Appeals.

That on or about the 27th day of September, 1909, there was served upon this affiant at the City of Sioux Falls, in the State of South Dakota, the Notice of Application to this Court for the writ of certiorari to be directed to the Judges of the said United States Circuit Court of Appeals for the said Eighth Circuit; that this affiant not being a party in interest in the said proceeding, except in his capacity as Judge of the said United States District Court for the said District of South Dakota, did not read or examine the said notice or application or the copy thereof, and did not call the same to the attention of S. W. Clark, the Attorney General of the State of South Dakota, or any other person interested in the said matters, but assumed and believed that the said application made to the said United States Circuit Court of Appeals for such writ of mandamus or other mandate or relief was based upon a full, true and correct copy or statement of all the proceedings which had theretofore been had in the said Circuit Court of the United States for the said District of South Dakota, as set forth in said Exhibit "A." That said affiant did not appear in this court, and was not represented herein, for the same reasons, upon the hearing of the said application for the said writ of certiorari, and assumed and believed that if a writ of certiorari should be issued from this court to the said Circuit Court of Appeals in the said matter, it would bring before this court the entire record upon which this affiant had acted, as Judge of the said United States Circuit Court at the time of the making of the orders and the taking of the proceedings therein had and herein complained of, and that this affiant still did not call the said matter to the attention

of the said Attorney General of the said State of South Dakota, or to any other persons interested in the said matter, by reason of his assumption and belief that a full, true and correct record of all the proceedings had before this affiant as such Judge in the said Circuit Court of the United States for the said District of South Dakota, would be presented to this court on an application for the said writ of certiorari; and this affiant assumed and believed that if upon such application for the said writ of certiorari herein there was presented to this court the entire record of the said matters in the said Circuit Court of the United States for the said District of South Dakota, substantially as herein set forth in said Exhibit "A" it would be unnecessary for either this affiant or any other person to be represented in the said matter upon the hearing of the said petition; and that this affiant did not call any of the said matters herein to the attention of the said Attorney General or to any other person interested therein, until the 30th day of November, 1909, at which time this affiant casually met, in the City of Sioux Falls, U. S. G. Cherry, Esq., of Sioux Falls, South Dakota, who had appeared as Special Counsel for the said State of South Dakota in the said proceedings set forth in said Exhibit "A" and that this affiant then for the first time called the matter of the said application for the writ of certiorari herein, or any of the said matters hereinbefore mentioned, to the attention of the said State of South Dakota or any of the other persons interested therein.

That theretofore, and on the 29th day of November, 1909, there was served upon this affiant, a notice of the granting and issuance of the writ of certiorari herein, and together therewith was presented by Sioux K. Grigsby of the said firm of Grigsby & Grigsby, Solicitors for the petitioners herein, a stipulation, with the request that this affiant sign the same, a true and correct copy of which is hereto attached, marked Exhibit "B" and is hereby referred to and made a part hereof; and that this affiant, still assuming and believing, and neither the said Grigsby & Grigsby or the said Sioux K. Grigsby having in any manner advised him to the contrary, that a true and complete certified copy of all the records and proceedings had in the said Circuit Court of the United States for the said State of South Dakota, substantially as shown by the said Exhibit "A" had been presented to and become a part of the records of the said Circuit Court of Appeals at the time of the application therefor for the said writ of mandamus or other mandate or relief therein, signed the said stipulation, Exhibit "B," and that had this affiant not understood and believed that there had been attached as a part of the petition to this court for the said writ of certiorari substantially a complete and correct copy of the whole of the said records in the said Circuit Court within and for the said District of South Dakota, he would not have signed the said stipulation, and that the said stipulation was signed by this affiant upon the said understanding and belief on his part. That this affiant did not know until after the signing of the said stipulation, nor until the service upon him of the printed record some days after the said 29th day of November, 1909, that there had not been presented to the said Circuit Court of Appeals a

substantially complete record of the said matters as set forth in Exhibit "A" herein, and did not know until inquiry was made by this affiant of the Clerk of the said Circuit Court within and for the said District of South Dakota, that there had not been any certified copies whatsoever of the said record in the said Circuit Court within and for the said District of South Dakota obtained, or made a part of the said proceeding in the said Circuit Court of Appeals.

That in truth and in fact the entire record of the proceedings had before affiant as Judge of the Circuit Court for the District of the State of South Dakota, was not certified to the Circuit Court of Appeals, but only a part thereof, and that only a part of said records and proceedings are now before this court, and that the signing of the stipulation, Exhibit "B" by this affiant was entered into by reason of the mistake and inadvertence heretofore referred to, and by reason of the failure of the said counsel for the said petitioners herein to advise this affiant that only a part of the records had been transmitted.

That the orders of which petitioners herein complain, were made and based chiefly upon matters as disclosed by said Exhibit "A," and not included in the record transmitted to this court on the said writ of certiorari.

JOHN E. CARLAND.

Subscribed and sworn to before me and in my presence by the said John E. Carland, this 21st day of December, 1909.

[Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.]

OLIVER S. PENDAR,
Clerk of the Circuit Court of the United States within and for the District of South Dakota.

EXHIBIT "A."

In the Circuit Court of the United States of America in and for the Southern Division of the District of South Dakota.

In Equity. No. 538.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Be it remembered, that on the 8th day of September, A. D. 1908, there was filed in the above entitled court on behalf of the complainants, Bill in Equity; which said Bill in Equity is in words and figures the following, to-wit:

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

Bill in Equity.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Dakota, in Chancery sitting:

John C. McClellan, a citizen and resident of Ellis County, in the State of Texas, James S. McClellan, a citizen and resident of Pulaski County, in the State of Arkansas, William S. McClellan, a citizen and resident of Teller County, in the State of Colorado, and Walter McClellan and Edmund McClellan, both of whom are citizens and residents of Allegheny County, in the State of Pennsylvania, bring this their bill of complaint against George T. Blackman, a citizen and resident of the State of South Dakota, as special administrator of the estate of John McClellan, deceased, and thereupon your orators, and each of them, complain, allege and show to the Court:

First.

That John McClellan, whose true name was John McClelland, was a citizen and resident of the County of Minnehaha and State of South Dakota, died, intestate, on or about the 31st day of August, 1899, in the City of Sioux Falls, County of Minnehaha and State

of South Dakota, and that said deceased left an estate in the aforesaid county and state consisting of real and personal property of the value at the time of his death, aforesaid, so far as is known to these complainants of about the sum of Thirty-three Thousand Dollars (33,000.00).

Second.

That thereafter and on or about the 8th day of February, 1900, the County Court in and for said County of Minnehaha and State of South Dakota, after due and regular proceedings therein made, filed and entered its order and issued letters of administration to one William Van Eps of said County and State, as administrator of the said estate of said John McClellan, deceased. That said William Van Eps duly qualified as such administrator and did take possession of the said estate and held possession thereof until on or about the 12th day of July, 1906, when the said William Van Eps departed this life.

Third.

That thereafter such proceedings were had in the said County Court in the matter of the said estate, that on or about the 17th day of September, 1906, the said Court made, filed and entered its order and issued letters of special administration to George T. Blackman, defendant above named, as special administrator of the said estate. That the said George T. Blackman did then and there qualify as such special administrator and did then and there take possession of the said estate and ever since has been and is now the duly appointed, qualified and acting special administrator of the said estate of said John McClellan, deceased.

Fourth.

Your orators further allege and show that the value of the said estate of said John McClellan. deceased, situated and located within the State of South Dakota, and now in the possession and control of said George T. Blackman, as special administrator thereof, was on the first day of June, 1907, in excess of the sum of Thirty-five Thousand Dollars ($35,000.00); that the said estate at that time consisted of real estate situated in the City of Sioux Falls, County of Minnehaha, and State of South Dakota, and farm lands in the County of Davison, State of South Dakota, cash in the hands of the said George T. Blackman, bank stock and certain miscellaneous notes and other personal property.

That since the said first day of June, 1907, the said George T. Blackman, as administrator, has rented, and collected, the rents from certain of the real estate and farming lands belonging to said estate and has deposited certain of the said cash in hand so as to obtain interest thereon for the benefit of said estate.

Fifth.

Your orators further allege and show that there are no outstanding claims against the said estate, and that all the creditors of the said

John McClellan, deceased, have been paid and that the said estate is now ready for distribution thereof according to the Statutes of the State of South Dakota in such cases made and provided.

Sixth.

Your orators further allege and show that the value of the said estate of said John McClellan, deceased, situated and located within the state of South Dakota, and now in the possession and control of said George T. Blackman, as special administrator thereof, is in excess of the sum of Thirty-five Thousand Dollars ($35,000.00) and that there are no outstanding claims against the said estate and that all the creditors of the said John McClellan, deceased, have been paid and that the said estate is now ready for distribution thereof according to the statutes of the state of South Dakota in such cases made and provided.

Seventh.

Your orators further allege and show that the said John McClellan, deceased, was born in the Parish of Skryne in the County of Meath, Ireland, on or about the year A. D. eighteen Hundred and Twenty-one (1821) and that thereafter and on or about the 26th day of February, A. D. 1846, the said John McClellan, deceased, was duly and legally married to one Hannah Cruikshank in the Parish c-urch in said Parish of Skryne, County of Meath, Ireland.

Eighth.

That three sons were born of said marriage of which are the complainants, John C. McClellan, James S. McClellan and a third son, William S. McClellan; that said William S. McClellan departed this life on or about the year A. D. 1888, leaving three sons, who are your complainants William S. McClellan, Walter McClellan and Edmund McClellen.

Ninth.

Your orators further allege and show that the complainants John C. McClellan and James S. McClellan are sons and the complainants William S. McClellan, Walter McClellan and Edmund McClellan are the grandsons of the said John McClellan, deceased, and that your orators are the sole surviving heirs at law and next of kin of the said deceased and are lawfully entitled to inherit the estate of the said deceased under and by virtue of the laws and statutes of the said State of South Dakota.

In consideration whereof, and inasmuch as your orators have no sufficient remedy at law and are only relievable in a court of equity where matters of this character are cognizable and reviewable, to the end, therefore, that your orators may obtain the relief to which they are justly entitled in the premises, and which they can only obtain in a court of equity, your orators pray the court to grant them due process by subpœna directed to said George T. Blackman, as special administrator of the estate of John McClellan, deceased, commanding and requiring him to appear herein and answer, but not under oath,

the same being expressly waived, the several allegations in this your orators' bill contained.

And your orators further pray that upon the final hearing it be ordered and decreed that your complainants John C. McClellan and James S. McClellan are sons and your complainants William S. McClellan, Walter McClellan and Edmund McClellan are grandsons of said John McClellan, deceased, and that your orators are the sole surviving heirs at law and next of kin of said deceased and entitled to inherit the said estate; and that the title in fee to all of the said real estate is in them, the said complainants, and that it be further ordered and decreed that the said George T. Blackman, special administrator and defendant herein, render a just and true account of all the moneys and credits, bank stock, rents and interest collected and other personal property now in his hands belonging to the said estate, and that, after deducting his lawful fees and expenses lawfully incurred as such administrator, he distribute all of the personal property in his hands, as such special administrator, according to the laws of the State of South Dakota, in such cases made and provided, to-wit: To complainants John C. McClellan and James S. McClellan one-third to each thereof, and to complainants William S. McClellan, Walter McClellan and Edmund McClellan to each one-ninth thereof, and failing so to do that these complainants may have judgment against him, the said George T. Blackman, as special administrator, for the total value of all of the said personal property found to be in his hands and under his control.

That pending a determination of this suit the said George T. Blackman, as special administrator aforesaid, be directed and required to hold intact the said estate, and both real and personal property thereof, and that he may be enjoined pendente lite from disposing or attempting to dispose of, or from distributing, and from assigning or turning over to any person or persons whatsoever, the said estate or any part thereof until further order of this Court in the premises; and that the Court grant such other and different relief herein as may be equitable and just.

And your orators as in duty bound will ever pray.

JOHN C. McCLELLAN,
JAMES S. McCLELLAN,
WILLIAM S. McCLELLAN,
WALTER McCLELLAN,
EDMUND McCLELLAN,
By GRIGSBY & GRIGSBY,
Solicitors and of Counsel for Complainants, Sioux Falls, S. Dak.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Personally appeared Melvin Grigsby, who being first duly sworn, deposes and says: That he is a member of the firm of Grigsby & Grigsby, solicitors and of counsel for the complainants above named; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the reason that this verification is not

made by the said complainants or either of them is that none of the said complainants are residents of or now within the County of Minnehaha and State of South Dakota, wherein deponent resides.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 8th day of September, A. D. 1908.

[NOTARIAL SEAL.]

A. B. MULLER,
Notary Public, South Dakota.

(Endorsed:) Circuit Court of the United States, District of South Dakota, Southern Division—John C. McClellan, James S. McClellan, William S. McClellan, Walter McClellan and Edmund McClellan, Complainants, against George T. Blackman, Special Administrator of the estate of John McClellan, deceased, Defendant—Bill in Equity—Filed Sep. 8, 1908, Oliver S. Pendar, Clerk, By Odin R. Davis, Deputy.

And, to-wit, on the same day there was filed in the office of the clerk of said court, Præcipe for Writ of Chancery Subpœna; which said Præcipe is in words and figures the following, to-wit:

In the Circuit Court of the United States within and for the Southern Division of the District of South Dakota. In Equity.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

To the Clerk of the above entitled Court:

Please issue Writ of Chancery Subpœna for the defendant above named in the above entitled suit, returnable on the first Monday in October, A. D. 1908.

GRIGSBY & GRIGSBY,
Solicitors for Complainants.

(Endorsed:) Circuit Court of the United States, District of South Dakota, Southern Division—John McClellan, et al., vs. George T. Blackman, Special Administrator of the estate of John McClellan, deceased—Præcipe for Writ of Chancery Subpœna—Filed Sep. 8, 1908, Oliver S. Pendar, Clerk, By Odin R. Davis, Deputy.

And, to-wit, on the same day there was issued out of the office of the clerk of said court, Chancery Subpœna; which said Chancery Subpœna, together with the Marshal's return of service endorsed thereon, is in words and figures the following, to-wit:

UNITED STATES OF AMERICA,
Southern Division of the District of South Dakota:

The President of the United States of America to George T. Blackman, Special Administrator of the Estate of John McClellan, Deceased, Greeting:

You are hereby commanded to be and appear at Rules to be held at the office of the Clerk of the Circuit Court of the United States, for the District of South Dakota, on the first Monday of October, next, at the City of Sioux Falls, then and there to answer the Bill of Complaint of John C. McClellan, a citizen of the State of Texas; James S. McClellan, a citizen of the State of Arkansas; William S. McClellan, a citizen of the State of Colorado; and Walter McClellan and Edmund McClellan citizens of the State of Pennsylvania, filed against you on the 8th day of September, A. D. 1908, hence fail not.

Witness: The Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of September, A. D. 1908. Issued at my office in the city of Sioux Falls, under the seal of said Circuit Court, the day and year last aforesaid.

[SEAL OF COURT.] OLIVER S. PENDAR, *Clerk,*
By ODIN R. DAVIS, *Deputy.*

MEMORANDUM.—The above named defendant to enter his appearance in this suit in the Clerk's Office aforesaid; on or before the day at which this writ is returnable, otherwise, the bill may be taken pro confesso.

OLIVER S. PENDAR, *Clerk,*
By ODIN R. DAVIS, *Deputy.*

GRIGSBY & GRIGSBY,
Complainants' Solicitors.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within Chancery Subpœna on the therein named George T. Blackman, special administrator of the estate of John McClellan, deceased, at Sioux Falls, S. D., on the 14th day of September, 1908, by handing to and leaving with him a certified copy thereof.

SETH BULLOCK,
United States Marshal,
By JERRY CARLETON,
Deputy.

(Endorsed:) No. 538—United States Circuit Court, District of South Dakota, Southern Division—John C. McClellan, et al., vs. George T. Blackman, Special Administrator of the estate of John McClellan, Deceased—Chancery Subpœna—Returnable to October Rules, 1908,—Grigsby & Grigsby Complainants' Solicitors—Returned into the Clerk's office and filed this 14th day of September, A. D. 1908, Oliver S. Pendar, Clerk, By Odin R. Davis, Deputy.

And afterwards, to-wit, on the 25th day of September, A. D. 1908, there was filed in the office of the clerk of said court, Answer; which said Answer is in words and figures the following, to-wit:

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Answer.

Comes now the defendant in the above entitled action and for answer to the bill of complaint therein:

I.

Admits the first, second, third and fourth paragraphs thereof.

II.

As to every other allegation, statement and charge in said complaint contained defendant has no knowledge or information sufficient to form a belief and therefore denies the same.

III.

Defendant represents to this honorable court that he now holds and, until the order or judgment of this court to the contrary, will continue to hold, the property described in said bill of complaint to be disposed of agreeable to the judgment or order of this court, and disclaims any interest in and to said property or any part thereof save only in his official capacity as Special Administrator of the Estate of John McClellan, deceased.

GEORGE T. BLACKMAN, *Defendant.*

(Endorsed:) No. 538 S. D.—In the Circuit Court of the United States, for the District of South Dakota, Southern Division—John C. McClellan, et al., Plaintiffs, vs. George T. Blackman, Special Administrator of the Estate of John McClellan, Deceased, Defendant—Answer—Filed Sep. 25, 1908, Oliver S. Pendar, Clerk, By Odin R. Davis, Deputy.

And afterwards, to-wit, on the 28th day of October, A. D. 1908, there was filed in the office of the clerk of said court, Replication to Answer to Bill in Equity; which said Replication is in words and figures the following, to-wit:

BLURRED

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Replication to Answer.

Replication of Complainants in the Above Cause to the Answer of George T. Blackman, Special Administrator of the Estate of John McClellan, Deceased.

These repliants, saving and reserving all advantage of exception to the manifold insufficiencies of said answer, for replication thereto sayeth that they will aver and prove their said bill to be true and sufficient, and that the said answer is untrue and insufficient; wherefore repliants further pray relief as in said bill set forth.

JOHN C. McCLELLAN,
JAMES S. McCLELLAN,
WILLIAM S. McCLELLAN,
WALTER McCLELLAN,
EDMUND McCLELLAN,
By GRIGSBY & GRIGSBY,
Solicitors and of Counsel for Complainants,
Sioux Falls, S. Dak.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Personally appeared Melvin Grigsby, who being first duly sworn, deposes and says: That he is a member of the firm of Grigsby & Grigsby, solicitors and of counsel for the complainants above named; that he has read the foregoing replication to answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the reason that this verification is not made by the said complainants or either of them, is that none of the said complainants are residents of or now within the County of Minnehaha and State of South Dakota, wherein deponent resides.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 28th of October, A. D. 1908.

[NOTARIAL SEAL.]

E. E. RODABAUGH,
Notary Public, South Dakota.

(Endorsed:) No. 538 S. D.—United States Circuit Court, District of South Dakota, Southern Division—John C. McClellan, et al.,

Plaintiff-, against George T. Blackman, Special Administrator of the estate of John McClellan, Deceased, Defendant—Replication to Answer to Bill in Equity—Filed Oct. 28, 1908, Oliver S. Pendar, Clerk, By Odin R. Davis, Deputy.

And afterwards, to-wit, on the 24th day of November, A. D. 1908, there was filed in the office of the clerk of said court, Order granting the State of South Dakota leave to file its Petition in Intervention and Order to Show Cause why the State of South Dakota should not be granted leave to intervene; which said Order is in words and figures the following, to-wit:

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant; The State of South Dakota, Intervenor.

Order on Petition for Intervention.

The petition of the state of South Dakota for leave to intervene herein, duly verified by S. W. Clark, Attorney General of the state of South Dakota and by Alpha F. Orr, State's Attorney within and for the county of Minnehaha in the said state of South Dakota, having been presented to the court by U. S. G. Cherry as Special Counsel for the said State of South Dakota and for the said Attorney General and said State's Attorney and the same having been fully considered it is;

Ordered that leave be and the same is hereby granted to file the said petition herein; that the 21st day of December, at the hour of ten o'clock A. M. on that day is hereby fixed as the time and the court room of the said court in the Federal Building at the city of Sioux Falls in the said state, is fixed as the place for hearing upon the said petition; that a copy of the said petition and this order be served upon the said complainants or their said counsel Grigsby & Grigsby and upon the said defendant, or his said counsel, Aikens & Judge, at least 15 days before the date herein fixed for hearing, as aforesaid and that the said complainants and the said defendant show cause, if any they have, before this court at the said time and place herein fixed for such hearing or as soon thereafter as counsel can be heard, why leave should not be granted to the said State of South Dakota to intervene as a party to this action and why the said complainants herein should not answer the said petition within such time as may be fixed by the order of the court upon such hearing and that in case of the failure of said complainants so to do,

then that the said petition be taken as confessed by the said complainants and that a decree be entered herein accordingly and that the said complainants, at said time and place, further show cause, if any they have, why leave should not be granted to the said State of South Dakota to plead, demur or reply to the said answer of the said complainants herein, if such answer shall be made and to take and have such other proceedings herein as may be granted, ordered and allowed and as may be just and equitable.

Done at the city of Sioux Falls, in the said District of South Dakota, this 24th day of Nov. 1908.

By the Court:

JOHN E. CARLAND, *Judge.*

Attest:

OLIVER S. PENDAR, *Clerk.* [SEAL OF COURT.]

By ODIN R. DAVIS, *Deputy.*

(Endorsed:) No. 538 S. D.—In the Circuit Court of the United States for the District of South Dakota, Southern Division—John C. McClellan, et al., vs. George T. Blackman—Order for leave to file Petition in Intervention and to Show Cause—Due and timely service of the within order by copy, acknowledged this 24th day of November, 1908. Grigsby & Grigsby Attorneys for Complainants, Geo. T. Blackman for Geo. T. Blackman, Special Administrator—Filed Nov. 24, 1908, Oliver S. Pendar, Clerk, By Odin R. Davis, Deputy.

And, to-wit, on the same day there was filed in the office of the clerk of said court, Petition of the State of South Dakota in Intervention; which said Petition in Intervention is in words and figures the following, to-wit:—

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant; The State of South Dakota, Intervenor.

Petition in Intervention.

Comes now the State of South Dakota by S. W. Clark, Attorney General within and for the said State, Alpha F. Orr, the State's Attorney for the said State within and for the County of Minnehaha, and U. S. G. Cherry, Special Counsel for the said State of South Dakota and shows to the Court that a Bill of Complaint has been filed in the above entitled cause wherein it is alleged that the said complainants are *each* citizens and residents of the states named therein other than the state of South Dakota and that the defendant

is a citizen and resident of the State of South Dakota; that one John McClellan, whose true name was John McClelland was a citizen and resident of the County of Minnehaha and State of South Dakota and died therein intestate on or about the 3rd day of August, 1899, leaving an estate in the said County of Minnehaha consisting of real and personal property of the value of about Thirty-five Thousand Dollars ($35,000.00); that certain proceedings were had in the County Court within and for the said County of Minnehaha whereby William Van Eps was appointed, qualified and entered upon the discharge of his duties as administrator of said estate and took possession thereof and held possession of same until on or about the 12th day of July, 1905; that such proceedings were had in the said County Court, that on or about the 17th day of September, 1906, the said defendant herein, George T. Blackman, was, by the said County Court, appointed special administrator of the said estate and took possession of the same after qualifying as such special administrator and is now acting in the capacity of such special administrator and holds in his possession the said estate and that there are no outstanding claims against the said estate and that all the creditors of the said John McClellan, deceased, have been paid and that the said estate is now ready for distribution and that the complainants herein are the heirs at law and next of kin of the said John McClellan, deceased, and praying a subpœna be directed to said George T. Blackman as special administrator of the said estate requiring him to appear herein and answer the said Bill of Complaint and that upon final hearing herein, it be decreed that the said complainants are the sole surviving heirs at law and next of kin of said deceased and are entitled to inherit said estate and that the title in fee of all the said real estate has devolved upon them and that the said George T. Blackman, as such special administrator, render an account of all moneys, crops and other property in his hands belonging to the said estate to the said complainants and that the same be turned over and delivered to the said complainants and that the said George T. Blackman, as such special administrator, during the pendency of this action be restrained by the order of this Court from disposing or attempting to dispose of or distribute and from assigning or turning over to any person or persons, whatsoever, the said estate or any part thereof and for such other relief as is prayed for in the said Bill of Complaint which is hereby referred to, and that such proceedings were herein had that such subpœna did issue and was served upon the said George T. Blackman, as such special administrator, and that he has appeared herein and answered, admitting certain allegations in the said Bill of Complaint and denying certain other allegations therein and wherein he states that he now holds the said property and estate and, until the order and judgment of this court to the contrary, he will continue to hold the same to be disposed of agreeable to the judgment or order of this court and disclaims any interest in the said estate of the said John McClellan, deceased, or any part thereof, save in his official capacity as said special administrator to which answer reference is hereby made and that the said complainants have made and filed their replication herein in

the usual form, reaffirming the allegations of their said Bill of Complaint, to which reference is hereby made.

And your petitioner herein alleges and shows to this court the following facts:

First.

That under the constitution and laws of the state of South Dakota it is provided that in case of the death of a person dying intestate, leaving property or estate within the said State of South Dakota and in case there is no one capable of succeeding to the said property or estate as provided by the statutes and laws of said state and in case the title to the estate or such property fails through a defect of heirs, the property of such decedent devolves and escheats to the State of South Dakota and that an action for the recovery of such property and to reduce it into the possession of the said State or for its sale and conveyance may be brought by the State's Attorney in the Circuit Court of the County or Judicial Subdivision in which said property is situated.

Second.

That by the constitution, statutes and laws of the said State it is provided and is made the duty of the Attorney General thereof, when requested by the Governor of the State, or either branch of the Legislature, to appear for the said State and prosecute or defend in any court or before any officer, in any cause or matter, civil or criminal, in which the state may be a party or interested, and attend or perform any other duties which may from time to time be required by law and that the Governor of the said State of South Dakota has requested the said S. W. Clark, as such Attorney General to appear herein or to take and have such other and further proceedings with reference to the property and estate of the said John McClellan, deceased, as may be necessary, proper or convenient to protect the rights and interests of the said State of South Dakota.

Third.

And this petitioner further alleges and shows to the Court that the said State of South Dakota is interested in the said property and estate mentioned and referred to in the Bill of Complaint herein and that the said John McClellan died at the city of Sioux Falls, in the County of Minnehaha and State of South Dakota, intestate, on or about the 3rd day of August, 1899, leaving said property and estate situated in the said county of Minnehaha and state of South Dakota, in which county and state deceased resided at the time of his death and had been domiciled since about the year 1857 and that there is no one capable of succeeding under the statutes and laws of the state of South Dakota, to said estate and that the title thereto has failed from a defect of heirs of the said deceased and that the said property of the said decedent has defaulted and escheated to the State of South Dakota.

Fourth.

And this petitioner further alleges and shows to the court that the said John McClellan was born in the County of Armagh, in Ireland in the Kingdom of Great Britain, on or about the 24th day of September, 1831, and removed from Ireland about the year 1850, and located and settled at the said city of Sioux Falls, county of Minnehaha on or about the 27th day of May, 1857 and continued as a resident of the Territory of Dakota from the said last mentioned date and thereafter of the State of South Dakota until the time of his death as hereinbefore set forth; that during all the time of his said residence in the Territory of Dakota and State of South Dakota, he was not known to have been visited by any persons claiming to be relatives, and during all of said time lived single and alone and was not in communication by letter or otherwise, with any persons claiming to be relatives and that but very little information by his friends and acquaintances, as to his identity, antecedents or personal history prior to the time of his settling and locating at the said city of Sioux Falls was ever obtained.

Fifth.

That the county court within and for the said county of Minnehaha, in the said State of South Dakota, is a court of probate, clothed with full and complete jurisdiction to administer upon the estates of deceased persons leaving property within the said county and state and was and is the court *have* the sole and exclusive jurisdiction in probate upon the estate of the said decedent.

Sixth.

That upon the day of the death of the said John McClellan, to-wit: on the 3rd day of August, 1899, a petition was filed in the said county court by Edward J. Taber for his own appointment as special administrator of the said estate and that such proceedings were had in the said court that it was ordered that the said Edward J. Taber be and he was constituted such special administrator thereof and duly qualified and entered upon the discharge of his duties as such special administrator, letters of special administration being duly issued to him out of the said county court and in pursuance of the same and of the proceedings so had in the said county court the said Edward J. Taber, as special administrator, took possession of the property and estate of the said decedent, including the property described in the Bill of Complaint herein and which is the subject matter of this action.

Seventh.

That on the said 3rd day of August, 1899, Hosmer H. Keith filed a petition in the said County Court, alleging that he was a creditor of the said deceased, that the said deceased had died intestate, without leaving heirs, and that as such creditor he was entitled to have letters of administration issue to him out of the said county court upon the said estate. That on the same day a like petition was filed

therein by the State Banking & Trust Co., wherein it was alleged that it was a creditor of the said decedent and that he had died intestate and that there were no heirs of said deceased and that as such creditor it was entitled to have letters of administration issue to it out of the said county court, upon the said estate, the said State Banking & Trust Co. being a corporation organized and existing under the laws of the state of South Dakota and in which it prayed for the appointment of the said Edward J. Taber as such administrator and for the issuance of such letters of administration to him upon the said estate; that upon the same day, another petition was filed in the said county court by John Powers in which he set forth and alleged that the said deceased had died intestate, that there were certain persons residing in Ireland who were the heirs at law and next of kin of said deceased and that he filed the said petition in their behalf and prayed the appointment of William Van Eps as administrator of the said estate; that on the same day another petition was filed in the said county court by C. V. Booth, claiming to be a friend and long acquaintance of the said deceased and praying that letters of administration upon the said estate issue out of the said county court to the said William Van Eps; that on the 21st day of August, 1899, one Margaret Carruthers filed a petition in the said county court alleging that said deceased died intestate and that she was a niece of the said deceased and was the heir at law and next of kin of the said decedent and praying for the issuance of letters of administration upon the said estate out of the said court to Cyrus Walts; that on the 28th day of August, 1899, one William R. Todd and Moritz Levinger filed a petition in the said county court alleging that they were creditors of the said deceased, that said deceased had died intestate and without any heirs at law or next of kin and praying for the appointment of Frank Forde as administrator of said estate and for the issuance of letters of administration thereon to him; that on the 2nd day of September, 1899, the said county court made an order and issued a commission appointing one Paul T. Wilkes as commissioner of the said court on behalf of unknown and non-resident heirs for the purpose and with the power and authority to proceed to Ireland to investigate and report to the said court concerning any heirs or next of kin of the said decedent residing therein and that on November 13th, 1899, upon the return from Ireland of the said Paul T. Wilkes, he caused to be filed a petition of one Margaret Hammill and Mary McClelland, residents of the county of Armagh, in Ireland, who are hereinafter referred to, for purposes of convenience, as the Ireland claimants, in which petition the said Ireland claimants alleged and set forth that they were nieces of the said deceased and were his heirs at law and next of kin, that he had died intestate, and praying that letters of administration upon the said estate issue to one Y. H. Atkinson, but which petition was afterwards so amended as to pray for the substitution of the name of William Van Eps instead of the said Y. H. Atkinson, as such administrator, and for the appointment of the said William Van Eps as such administrator; that on the 27th day of November, 1899, one John Barnes filed a petition in the said

county court alleging that he was a brother of the said deceased and was the only heir at law and next of kin of the said deceased and praying for the appointment of the said William Van Eps as administrator of the said estate and the issuance of letters of administration thereon to the said William Van Eps.

Eighth.

That on the 11th day of December, 1899, a petition was filed in the said county court by Mary A. Vine, wherein she alleged the death of the said John McClellan, intestate, and alleged that she was a sister of the said deceased and that she together with her brothers, William McClelland, Samuel McClelland, Abraham McClelland, James G. McClelland and her sisters, Jane McClelland Tether, Lucinda McClelland, Frances McClelland and Margaret McClelland Bulkley, who are hereinafter referred to as the Canadian claimants, for purposes of convenience, were the brothers and sisters of the said deceased and were entitled to have letters of administration upon the said estate issued to her and that they were the sole surviving heirs at law and next of kin of the said deceased and in which she contested and opposed the petitions of all the other petitioners hereinbefore mentioned and prayed that letters of administration upon the said estate be issued to the said Cyrus Walts.

Ninth.

That upon each of the above named petitions, separate orders were made by the said county court directing that notice be given thereof, addressed to the heirs at law and next of kin of said decedent and all other parties interested in said estate, containing the name of the said decedent, the name of the applicant for such letters, the day and term of the court at which the said application would be heard and fixing the time for such hearing and directing that such notice be published for the time and in the manner provided by the laws of the state of South Dakota and that in pursuance of each of the said petitions and orders, notice of such hearing was given by publishing the same in a newspaper in all respects as directed by the laws and statutes of the said state and the order of said court, for the time and in the manner provided by the said laws, and that each of the said notices were given and published separately and that such adjournments and continuances were had that all of the said petitions came on regularly for hearing on the 23rd day of December, 1899, proof having been made and filed in the said county court of the giving and publication of said notices and that the said petitioners herein did not nor did either of them, or did any one in their behalf appear at said hearing, and that a large amount of evidence was produced upon the said hearing in the said county court by the said Ireland claimants, the said Canadian claimants, the said Edward J. Taber, the said State Banking & Trust Co., the said Hosmer H. Keith, all the said other petitioners have defaulted upon the said hearing and that the taking of testimony upon said hearing was continued and adjourned from time to time and was not completed until on or about the 9th day of February, 1900, and

that the matter in issue upon the said petitions in the said court was as to whether or not the said decedent had left any heirs at law or next of kin and whether the said petitioners, or any of them claiming to be related to him as hereinbefore mentioned were the heirs at law or next of kin of the said deceased and that by the said county court it was found and determined that the said Ireland claimants were related to the said deceased as nieces and the petition of the said Ireland claimants was granted and all the said other petitions hereinbefore mentioned were in all things overruled and denied and it was ordered and directed that the said William Van Eps be appointed administrator of the said estate upon the petition of the said Ireland claimants and that letters of administration upon the said estate issue to him out of the said court upon his filing the oath of office and furnishing the bond and qualifying as provided by the statutes and laws of the state of South Dakota and that upon the same day the said William Van Eps did qualify as such administrator and such letters of administration were issued out of the said court to him and he entered upon the discharge of his duties as such administrator of said estate.

Tenth.

That under the statutes and laws of the state of South Dakota, administration of the estate of a person dying intestate must be granted to some one or more of the following persons and they are respectively entitled thereto in the following order, to-wit:

First. The surviving husband or wife, or some competent person whom he or she may request to have appointed.

Second. The children.

Third. The father or mother.

Fourth. The Brothers.

Fifth. The sisters.

Sixth. The grand-children.

Seventh. The next of kin entitled to share in the distribution of the estate.

Eighth. The creditors.

Ninth. Any person legally competent.

and that by the said statutes and laws, it is further provided that when there is a delay in granting letters of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an administrator or executor dies or is suspended or removed, the judge of the county court must appoint a special administrator to collect and take charge of the estate of the decedent and to exercise such other powers as may be necessary for the preservation of the estate and that upon the appointment of such special administrator, letters of special administration shall be issued to him out of such county court, specifying the powers to be exercised by the said administrator and that by said statutes and laws the said special administrator is an officer of such county court and it is made his duty therein to collect and preserve, for the executor or administrator, the goods, chattels, debts and effects of the decedent

all incomes, rents, issues and profits, claims and demands of the estate, to take the charge and management of the estate of the decedent and enter upon and preserve the same from damage, waste and injury and for such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator and may sell such perishable property as the county court may order to be sold and exercise such powers as are conferred upon him by his appointment but in no case is he liable to any action by a creditor on a claim against the decedent and except as herein stated such special administrator has no other or further power under the statutes and laws of said state and that by the statutes and laws of the said state it is further procided that when letters of administration upon the estate of a decedent have been granted, the powers of such special administrator cease and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands and that such administrator may prosecute to final judgment any suit commenced by such special administrator and that by the statutes and laws of said state it is further provided that such special administrator must render an account on oath, of his proceedings in like manner as other administrators are required to do, to the county court out of which such letters of administration have issued to him.

Eleventh.

That after such appointment and qualification of the said William Van Eps and the issuance of such letters of administration to him out of the said county court and during or about the month of April, 1900, the said Edward J. Taber as such special administrator, turned over and delivered to the said William Van Eps all of the property of the said estate of the said decedent in his hands as such special administrator, including the property and estate mentioned in the bill of complaint herein and made and rendered to the said county court a full and complete report and account of his acts and doings and of the said estate to the said county court and that such proceedings were therein had that he was duly discharged as such special administrator and the said estate passed into the hands of the said administrator William Van Eps.

Twelfth.

That after the making, filing and entry of the said order appointing the said William Van Eps as such administrator of the said estate and in the time and in the manner provided by law, the said petitioner, Hosmer H. Keith, the said petitioner, State Banking & Trust Co., and the said petitioner, Mary A. Vine separately and duly perfected appeals to the Circuit court of the state of South Dakota, within and for the county of Minnehaha, from the said order, that being the court having jurisdiction of such appeal and to which court only, appeals may be perfected from the said county court in matters pertaining to probate or administration upon the estate of deceased persons and that none of the other petitioners whose petitions had been filed in the said county court took or per-

fected any steps whatever for an appeal or to obtain a revocation of the said order and decision of the said county court, either by appeal or otherwise and that each of the said petitioners who did perfect appeals to the said circuit court as hereinbefore made and filed separately, supersedeas bonds in conformity with the statutes and laws of the state of South Dakota governing such appeals and all the papers in the said proceedings, as provided by law, were duly transmitted by the clerk of the said county court to the clerk of the said circuit court, each of the said appeals being from the whole of the said order and upon all questions of both law and fact and being so perfected as to entitle each of the said appellants to a new trial under their said petitions in the said circuit court, and that the judge of the county court, prior to the taking of the said appeals had found and determined and had caused the fact to be entered upon the minutes of the said court that the preservation of the said estate required that such letters of administration thereon should issue to the persons so designated and appointed by him, to-wit: William Van Eps, as administrator of the said estate notwithstanding the said appeals. And this petitioner alleges and shows to the court that under the statutes and laws of the said state, the letters of administration so issued to the said William Van Eps did not confer upon him any power to distribute and prohibited him from distributing the property of the said decedent among the next of kin of the said decedent, if it should be found and determined that there were such next of kin, until the final determination of the said several appeals from the said county court to the said circuit court.

Thirteenth.

That while the said matter was so pending in the said circuit court upon the said several appeals hereinbefore mentioned and was pending in the said county court upon the said proceedings hereinbefore mentioned and on the 24th day of February, 1900, the said James S. McClellan, one of the complainants herein, filed in the said county court his petition for the revocation of the said letters of administration issued to the said William Van Eps and praying for the issuance of letters of administration to himself and to Edmund C. Hinde and alleging in the said petition the facts hereinbefore set forth with reference to the filing of petitions in the said county court by the said Edward J. Taber, the said State Banking & Trust Co., the said John Powers, the said C. V. Booth, the said W. R. Todd and Moritz Levinger, the said John Barnes, the said Margaret Carruthers, the said Canadian claimants, and the said Ireland claimants for the issuance of letters of administration upon the said estate and alleging that due notice upon the said petitions had been given and that a hearing thereof was had as hereinbefore set forth and that an order had been made appointing the said William Van Eps as administrator of the said estate as hereinbefore set forth and that letters of administration had been issued to him thereon after the said administrator had duly qualified as provided by law and alleging that the said William Van Eps was neither the surviving husband or wife, child, father, mother, brother or sister of said intestate

and alleging that he, the said petitioner, James S. McClellan, was a son of the said decedent and alleging that the heirs at law and next of kin of the said deceased were the complainants herein and that the said decedent in his life time was married to one Hannah Cruikshank, who became his lawful wife and that the issue of the said marriage, were the said petitioner, James S. McClellan, one of the complainants herein and his brothers, John C. McClellan and William S. McClellan, which William S. McClellan said petitioner alleged had pre-deceased the said John McClellan, deceased, leaving as issue and as his heirs at law and next of kin the remaining complainants herein, to-wit: William McClellan, Walter McClellan and Edmund McClellan and in which petition the said James S. McClellan set forth that he specifically contested and opposed each and every of the said petitioners whose petitions had been filed in the said county court and all rights that may have accrued before the said court by virtue of the same, a copy of which petition is hereto attached, marked Exhibit "A" and is hereby referred to and made a part hereof; that in pursuance of the said petition of the said James S. McClellan for such revocation of the said letters of administration theretofore issued to the said William Van Eps upon the said petition of the said Ireland Claimants, an order was duly made in the said county court fixing a time for hearing upon the said petition and directing that notice be given as required by law and further directing that a citation issue out of the said court to the said administrator, William Van Eps, to appear and answer the same at the time so designated and for the said hearing and that in pursuance of the said order and for the time and in the manner provided by law, notice of such hearing upon the said petition was given and the said citation was duly served upon the said William Van Eps as such administrator and the said matter came on for hearing upon the said petition and upon the said hearing the said administrator, William Van Eps, the said Ireland claimants, the said Canadian claimants, the said Hosmer H. Keith, the said State Banking & Trust Co. and all persons who were not in default theretofore under their said petitions in the said county court appeared and were heard and a large amount of evidence was produced and that by the said county court it was then found and determined that the said James S. McClellan was not, nor were any of the complainants herein, in any manner whatsoever, related to the said John McClellan, deceased, and were not entitled to any of the relief prayed for in said petition and their said petition was in all things over-ruled and denied, a copy of the said order for hearing upon the said petition of the said James S. McClellan being thereto attached, marked Exhibit "B" and hereby referred to and made a part hereof and a copy of the said notice and of the proof of publication of the same, of hearing upon the said petition of the said James S. McClellan being also hereto attached, marked Exhibit "C," hereby referred to and made a part hereof, and a copy of the said order of the said county court, overruling and denying the petition of the said James S. McClellan being hereto attached, marked Exhibit "D," and hereby referred to and made a part hereof; and that on the 23rd day of

April, 1900, the said James S. McClellan duly perfected an appeal from the said order of the said county court, overruling and denying his said petition to the said circuit court within and for the said county of Minnehaha, that being the court having the proper appel-ant jurisdiction thereon, the said appeal being perfected upon all the issues of both law and fact therein and in such manner as to entitle, under the statutes and laws of the state of South Dakota, the said James S. McClellan, to a new trial of all the issues involved therein in the said circuit court, the said petitioner, James S. McClellan, having filed a supersedeas bond in the said county court.

Fourteenth.

That such proceedings were had in the said circuit court that the said matter came on for trial before the said court before a jury, on the 12th day of October, 1900, upon the said petition of the said James S. McClellan and his said appeal to the said Circuit court and upon the petition of the said Ireland claimants and upon the petition and the said appeals of the said Canadian claimants, the said Hosmer H. Keith, the said Edward J. Taber and the said State Banking & Trust Co., the said administrator, William Van Eps, being represented by counsel upon the said trial, the said James S. McClellan having moved the said court to submit to the determination of a jury all the issues of fact involved in the said several appeals and the said motion having been granted and all the parties to the said several appeals having appeared and consented including the said Ireland claimants to the trial of the said appeals together, in one trial and that one of the issues of fact then tried and submitted to the said jury was whether the said James S. McClellan and John C. McClellan, complainants herein, were the sons and whether the said William S. McClellan, Edmund McClellan and Walter McClellan, complainants herein were the grand-sons of the said John McClellan, deceased, and whether the said Canadian claimants were brothers and sisters of the said deceased and whether the said Ireland claimants were nieces of the said deceased and that in the said proceedings in the said circuit court all the complainants herein appeared by their counsel, Grigsby, Wright & Grigsby and participated in the taking of testimony and in preparing the said cause for trial and became parties to the said proceeding, and that upon the said trial in the said circuit court, the said James S. McClellan, the said John C. McClellan and the said William S. McClellan were present in person and testified in behalf of the said petitioner, James S. McClellan and were also present and testified in behalf of the said petitioner, James S. McClellan, upon the hearing of the said petition of the said James S. McClellan in the said county court upon the said trial; that a verdict was duly rendered and findings of fact and conclusions of law were thereafter made and duly filed and a judgment was thereafter, by the said court, duly entered, to the effect that none of the complainants herein were sons or grandsons of the said deceased and that the said Ireland claimants were not the nieces of the said deceased and that the said Canadian claimants were the brothers and sisters respectively of said deceased and

that the petition of the said Canadian claimants should be granted and that the said Cyrus Walts should be appointed as administrator of the said estate and letters of administration should be duly issued to him upon his qualifying as such administrator as provided by law.

Fifteenth.

That such proceedings were thereafter had in the said circuit court that bills of exception were duly and separately settled and allowed in favor of the said administrator, William Van Eps, the said Ireland claimants and the said James S. McClellan, and that thereon motions for a new trial were duly and regularly brought on for hearing before the said circuit court by the said William Van Eps as administrator, the said Ireland claimants and the said petitioner, James S. McClellan, which motion was based upon the said bills of exceptions and upon affidavits as to newly discovered evidence and which motions were each duly granted by the said circuit court and the said verdict, findings, conclusions and judgment were duly set aside and vacated and that such proceedings were thereafter had that the said matters came on for a new trial in the said circuit court on the 11th day of June, 1901, upon the said petition of the said Ireland claimants, the said petition of the said Canadian claimants and the said petition of the said complainant herein, James S. McClellan and upon their said several appeals, the said administrator appearing therein; all the other parties and petitioners to such proceedings having theretofore become and at the said re-trial remaining in default therein and in no manner appearing or participating in the said re-trial and the said cause was duly tried before the court, without a jury, upon all the issues of both law and fact therein and that a large amount of testimony was produced in support of the petition of the said James S. McClellan and the other parties to the said proceeding, to-wit: the said administrator, William Van Eps, the said Canadian Claimants and the said Ireland claimants and that such proceedings were had upon the said re-trial that it was found and determined by the said court that the said Canadian claimants were not the brothers or sisters, that the said Ireland claimants were not the nieces and that the said complainants herein, James S. McClellan and his brothers were not the grandsons or heirs of the said John McClellan, deceased, and that the order of the said county court appointing the said William Van Eps as the administrator of the said estate and directing that letters of administration thereon issue out of the said court to him be reversed, vacated and set aside to the end that some person might be appointed administrator of the said estate upon the application of some person or persons authorized to petition therefor and that such further proceedings were had thereafter in the said county court that bills of exceptions were separately settled and allowed in behalf of the said Canadian claimants and the said James S. McClellan and affidavits of newly discovered evidence were duly presented to the said court in behalf of the said petitioner, James S. McClellan, and motions for a new trial of the said matter were separately presented in behalf of the said Canadian claimants, based upon the said bill of

exceptions and the said affidavits as to newly discovered evidence and the same came on for hearing and both of said motions were duly over-ruled and denied, and that no other or further proceedings were had in the said matter by or in behalf of the said administrator or of the said Ireland claimants or any of the other petitioners or persons and that such proceedings were therein had that separate appeals were taken and perfected by the said Canadian claimants and by the said James S. McClellan from the said orders of the said circuit court, over-ruling and denying their said motions for a new trial and from the said order of the said circuit court, finding and adjudging that the said Canadian claimants and the said James S. McClellan were not nor were any of them, related to the said John McClellan, deceased, and directing that the said order appointing the said William Van Eps as administrator should be vacated and set aside, which appeals were duly perfected by the said James S. McClellan and the said Mary A. Vine to the Supreme Court of the state of South Dakota during or about the month of June, 1902, and that the said matters came on for hearing in the said Supreme Court at the October, 1902, term thereof and that the same were duly tried, argued and presented to the said Supreme Court and held under advisement until the 3rd day of October, 1906, at which time such proceedings were therein had that the said Supreme Court duly affirmed the order of the said Circuit Court denying the said separate motions of the said Canadian claimants and the said petitioner James S. McClellan for new trials therein and that in and by the said order of the said Supreme Court, it was ordered and directed that in all further proceedings in the said circuit court and the said county court in the said matter of the said estate of the said John McClellan, deceased and until the property belonging to the said estate should be lawfully distributed as provided by law the State's Attorney within and for the said county of Minnehaha should be given notice of all further proceedings in relation to the said estate and that such proceedings were had in the said Supreme Court within the time and in the manner provided by law, that a petition was filed therein by the said James S. McClellan, for a re-hearing therein upon the said matter, a copy of which was duly served upon the said State's Attorney and upon the Attorney General of the state of South Dakota, and that on or about the 8th day of August, 1906, a re-hearing therein was granted by the said Supreme Court to the said James S. McClellan, the said petitioner, Mary A. Vine, and the said administrator, William Van Eps, having each failed to file in said court a petition for re-hearing, in the matter or to take or have any further steps or proceedings therein and that in granting the said re-hearing by the said Supreme Court, it was ordered and directed by said court that all abstracts and briefs should be served upon the Attorney General of the State of South Dakota and the said State's Attorney within and for the said county of Minnehaha and that pursuant to the said re-hearing so granted in the said Supreme Court, the said matter came on for re-hearing therein at the April, 1907 term of the said court, the said Attorney General of the state of South Dakota and the said State's Attorney appearing

therein at said time, in behalf of the said State of South Dakota and filing briefs therein and that such proceedings were had in the said Supreme Court in said re-hearing, that the said court reversed the order of the said circuit court denying a new trial to the said petitioner, James S. McClellan, and ordering and directing that a new trial upon the said petition of the said James S. McClellan be granted and order and remittitur of the said Supreme Court was duly transmitted to the clerk of the said circuit court and that such proceedings were had thereafter in the said circuit court, in pursuance of the said order of the said Supreme Court that the said State's Attorney on the 11th day of February, 1908, presented to the said circuit court an information and petition on the part of the state of South Dakota setting out in substance the facts hereinbefore recited and praying that he be granted leave to file his said information and petition in the said matter in the said circuit court and setting out and alleging in the said information and petition that there is a defect of heirs of the said John McClellan, deceased, and that he left no one capable of succeeding to the said estate and that the said estate had devolved and escheated to the said state of South Dakota and praying that leave be granted to him to intervene in the said matter and reciting and alleging that the said James S. McClellan was not, in any manner whatever, related to the said deceased and praying that the said circuit court grant leave to the said state of South Dakota, upon such new trial in the said circuit court to produce evidence therein in support of the various matters set forth in the said petition and that the said state of South Dakota be permitted to contest the petition of the said James S. McClellan and that at the same time a motion came on for hearing in said circuit court for leave to file the said petition and information of the said State's Attorney and for an order granting the relief therein prayed for and that upon the hearing of the said petition and motion, leave was granted to the said State's Attorney to file the said petition and to present the said evidence and that upon the said new trial upon the said petition of the said James S. McClellan in the said circuit court, the interests of the state of South Dakota were represented by the said State's Attorney, the said Attorney General and the said Special Counsel for the said State's Attorney and the said Attorney General, and that such proceedings were had in the said circuit court that the said matter came on for a new trial therein on the said 11th day of February, 1908, upon the said petition of the said James S. McClellan and upon the said information and petition of the said State's Attorney, the said petitioner, James S. McClellan, appearing by his attorneys Grigsby & Grigsby, and the state of South Dakota appearing by the said State's Attorney and the said Attorney General and its said Special Counsel and that a large amount of evidence was produced both by the said James S. McClellan and by the said State of South Dakota, the petitioner herein, and that the principle matter in issue upon the said new trial was whether or not the said complainants herein were the sons and grandsons respectively of the said decedent and as such were entitled to nominate and designate the administrator of the said estate and that such proceedings were had therein that it was found and determined by the said circuit

court that the said James S. McClellan and John C. McClellan were not the sons and that the said William S. McClellan, Walter McClellan and Edmund McClellan were not the grand-sons of the said decedent and that findings of fact and conclusions of law and judgment therein have been made, filed and entered in the said circuit court adjudging and determining that the said complainants herein are not the heirs at law or next of kin of the said deceased and are in no manner related to said deceased and are not entitled to have administration granted upon the petition of the said James S. McClellan and *and* directing that said cause be remitted with the files therein to the said County Court for all further proceedings in the administration of said estate including the appointment of a general administrator thereof and directing that letters of adminstration issue to him upon the said estate upon his qualifying as provided by law; that upon the said new trial in the said circuit court, commenced on the said 11th day of February, 1908, the said special administrator, George T. Blackman, appeared by his counsel and became a party thereto and in open court announced his readiness and willingness to abide the order of the said court in the said matter.

Sixteenth.

That during the pendency of the said proceedings in the said Supreme Court and on or about the 12th day of July, 1906, and while he was acting as administrator of the said estate, the said William Van Eps died; that soon after the death of the said John McClellan, deceased, and during or about the month of December, 1899, a purported order or direction was made in the said county court by the judge thereof, designating Sioux K. Grisby, who was one of the members of the said firm of attorneys of Grigsby, Wright & Gribsgy and is one of the attorneys for the complainants herein as an agent or attorney for unknown and non-resident heirs, with certain limited powers and duties specified in the said order and that after the death of the said William Van Eps, the said Sioux K. Grigsby, purporting to act as the attorney for unknown and non-resident heirs of the said decedent, filed a petition in the said county court alleging the death of the said William Van Eps and praying the appointment of the said defendant herein, George T. Blackman as special administrator of the said estate and that upon the said petition, such proceedings were had in the said county court that an order was made designating and appointing the said George T. Blackman as such special administrator on the 17th day of September, 1906, and directing that letters of special administration upon the said estate issue to him upon his filing the bond, taking the oath of office and qualifying as such special administrator and that the said defendant herein did qualify as such special administrator and such letters of special administration were issued to him out of the said county court, a true and correct copy of which is hereto attached, marked Exhibit "E" and is hereby referred to and made a part hereof and this petitioner alleges, upon information and belief, that the said Grigsby & Grigsby, in various matters pertaining to the administration of the said estate, since the same passed

into the hands of the said special administrator, have acted as counsel for the said special administrator, and petitioner further alleges and shows to the court that none of the material facts hereinbefore set forth with reference to the said proceedings had in the said county court, the said circuit court or the said Supreme Court are set forth either in the said bill of complaint, the said answer, or the said replication herein and that no notice of any of the proceedings heretofore had in this court has been given by the said special administrator or by his counsel for the complainants herein to the said State's Attorney, the said Attorney General or their said Special Counsel herein.

Seventeenth.

That the rights and interests of the said state of South Dakota are liable to be affected by the proceedings herein and that it is necessary to the protection of the rights of this petitioner that leave be granted to it to intervene herein and to file this its petition in intervention and to require the said complainants herein to answer to the same, that the said intervenor be permitted to produce evidence herein and participate in this action as a party thereto.

Wherefore your petitioner prays that it may be granted leave to file this its petition in intervention herein; that a time be fixed by order of the court for hearing hereon; that a copy of this petition and the said order be directed to be served upon the said complainants, the defendant or their counsel, and that the said complainants and the said defendant be required, at the time fixed by the said order, to show cause, if any they have, why leave should not be granted to this petitioner to intervene as a party to this action, and that upon the hearing of the said order to show cause, it be ordered and directed that the said complainants herein answer the said petition herein within a time to be fixed by the order of the court and that in case of their failure so to do then that this petition be taken as confessed by the said complainants and in that event that judgment be entered herein upon the merits, against the said complainants, and for the recovery of the costs and disbursements of this petitioner herein and that in case the said complainants answer herein, then that this petitioner be granted leave to plead, demur, or take and have such other proceedings herein as it may be advised and that upon the final hearing herein it be adjudged and determined that the said complainants herein are not entitled to maintain this suit and that this court is without jurisdiction to grant the relief prayed for by complainants and for such other, further and different relief in the premises as may be just and equitable.

ALPHA F. ORR,
States Attorney for the State of South Dakota
Within and for the County of Minnehaha.
S. W. CLARK,
Attorney General of the State of South Dakota.
U. S. G. CHERRY,
Special Counsel for the said State's Attorney and
Attorney General and for the Petitioner Herein.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Alpha F. Orr, being first duly sworn, deposes and says that he is the State's Attorney within and for the county of Minnehaha and state of South Dakota, that he has read the above and foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

ALPHA F. ORR.

Subscribed and sworn to before me this 24th day of November, 1908.

[NOTARIAL SEAL.] C. A. CHRISTOPHERSON,
Notary Public Within and for the
County of Minnehaha, State of South Dakota.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

S. W. Clark, being first duly sworn, deposes and says, that he is the Attorney General of the state of South Dakota, that he has read the above and foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

S. W. CLARK.

Subscribed and sworn to before me this 24th day of November, 1908.

[NOTARIAL SEAL.] C. A. CHRISTOPHERSON,
Notary Public Within and for the
County of Minnehaha, State of South Dakota.

EXHIBIT "A".

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In County Court.

Petition for the Revocation and Petition for the Issuance of Letters of Administration.

To the Honorable William A. Wilkes, Judge of the County Court of Minnehaha County, in the State of South Dakota:

The petition of James S. McClellan of the city of Little Rock in the State of Arkansas respectfully shows:

That John McClellan, whose true name was John McClellan, died on or about the third day of August, 1899, in the city of Sioux Falls, County of Minnehaha, State of South Dakota, and that said deceased left an estate in the aforesaid county and state, consisting of real and personal property. That the value and character of said property so far as known by your petitioner is as follows, to-wit:

That said real property consists largely of lots, in the city of Sioux Falls, upon some of which improvements are situated, and certain shares, interests and rights in certain lots in said City, and other lands and premises in the aforesaid County of Minnehaha, as to the exact value of which your petitioner is unable to estimate; that said personal property consists largely of notes, mortgages, due bills, accounts, certificates of deposit and other deposits of moneys in banks and other personal effects and bills, in the said City of Sioux Falls.

That the personal estate and effects of, for and in respect to which letters of administration are hereby applied for, as your petitioner is informed and believes, do not exceed the value of Thirty Thousand Dollars ($30,000), and the rents, issues and profits of the real estate do not exceed, as your petitioner is informed and believes and upon such information alleges, the sum of One Thousand Dollars ($1,000).

That due search and inquiry have been made to ascertain if said deceased left any will and testament, but that none has been found, and your petitioner alleges upon his best knowledge, information and belief that said deceased died intestate.

That subsequent to the death of said John McClelland, petitions praying for the issuance of letters of administration were filed with this Honorable Court as follows, to-wit: by Edward J. Tabor, filed herein for his own appointment; by the State Banking & Trust Company, a corporation, filed herein for the appointment of Edward J. Tabor; by John Powers and J. C. Carpenter, filed herein for the appointment of William Van Eps; by C. V. Booth filed herein for the appointment of William Van Eps, by Moritz Levinger, W. R. Todd and M. Kaufman, filed herein for the appointment of Frank Forde; by John Barnes for the appointment of William Van Eps; by Margaret Carruthers for the appointment of Cyrus Walts; by Mary A. Vine for the appointment of Cyrus Walts; by Margaret Hammill and Mary McClelland for the appointment of Henry Atkinson.

That thereafter upon due notice and the hearing in open Court of the petitioners aforesaid, this Court, by Order made and filed on the 8th day of February, 1900, decreed that letters of administration issue to William Van Eps, and in accordance therewith this Court by the Honorable William A. Wilkes, the Judge thereof, issued and filed on the 8th day of February, 1900, letters of administration herein to the said William Van Eps; and that thereupon the said administrator filed his bond as required by statute, qualified and entered upon the administration of said estate, and your petitioner alleges that said William Van Eps is neither surviving husband or wife, child, father, mother, brother or sister of said intestate.

That the next of kin of said intestate, and whom your petitioner is advised and believes and therefore alleges to be the heirs *of* law of said deceased are as follows, and are his children and the issue of such of them as have deceased leaving issue, to-wit: John C. McClelland, eldest son, age about 53 years, residing at Waxachie, Ellis County, Texas; William S. McClelland, second son, who pre-deceased said John McClelland, deceased, leaving issue as follows, to-wit:

William McClellan, about 29 years of age, residing at Little Rock, Arkansas, Walter McClellan and Edmund McClellan, both minors, whose exact age is to the petitioner unknown, who both reside at Pittsburg, Pennsylvania; James S. McClellan, third son, your petitioner, age forty-eight years, who resides at Little Rock in the state of Arkansas.

And your petitioner further alleges that the wife of said John McClelland, deceased, pre-deceased the said John McClellan, deceased; that your petitioner is the son of said deceased, and therefore as your petitioner is advised and believes, is entitled to letters of administration of said estate, and therefore contests and opposes each and every and all rights that may have accrued before this court by virtue of them.

Wherefore, your petitioner prays that the order of this court made and filed February 8, 1900, directing that letters of administration issue to the said William Van Eps, be set aside and that the letters of administration made, issued and filed February 8, 1900, to the said William Van Eps be revoked and held for naught; and that a day of court be appointed for the hearing of this application; that due notice thereof be made by said Court according to law, and that upon said hearing and the proofs to be adduced thereat, letters of administration of said estate be issued to your petitioner, James S. McClelland of Little Rock, Arkansas and Edmund C. Hinde of Sioux Falls, South Dakota, according to the Statutes in such cases made and provided.

Dated at Sioux Falls, S. D. this 24th day of February, 1900.

JAMES S. McCLELLAN,
Petitioner.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

James S. McClellan being first duly sworn deposes and says: that he has read the above and foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein contained on information and belief, and as to those matters he believes them to be true.

JAMES S. McCLELLAN.

Sworn to and subscribed before me this 24th day of February, 1900.

[SEAL.] SIOUX K. GRIGSBY,
Notary Public, Minnehaha County, So. Dak.

Filed Apr. 23, 1900, Minnehaha County, S. D.

W. J. CRISP,
Clerk Circuit Court.

EXHIBIT "B."

At a County Court Held in and for Minnehaha County, South Dakota, at the Office of the County Judge, in the City of Sioux Falls, in said County, on the Twenty-sixth Day of February, A. D. 1900.

Present: Honorable William A. Wilkes, County Judge.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In County Court.

In the Matter of the Estate of JOHN MCCLELLAN, Deceased.

On reading and filing the petition of James S. McClellan, of Little Rock, Arkansas, setting forth that John McClellan died intestate on the 3rd day of August, 1899, and that the petitioner is the son of the said deceased, and praying that letters of administration of the estate of said deceased be issued to the said petitioner and Edmund C. Hinde of Minnehaha County, South Dakota; and that the order of this Court made and filed February 8, 1900, directing that letters of administration shall issue to William Van Eps be set aside, and that said letters of administration to said William Van Eps made and filed on the 8th day of February, 1900, be revoked and held for naught.

It is Ordered that said application and petition be heard by the County Judge in and for Minnehaha County, South Dakota, at a —— term to be held at his office in the Court house at the city of Sioux Falls in said County of Minnehaha, on the 10th day of March, A. D. 1900, at ten o'clock A. M. of that day.

It is further Ordered, that due notice thereof be given by publishing of notice of hearing for ten days, once each day on the 27th day of February and on the 1st and 6th and 8th of March, A. D. 1900, prior to said hearing, in the Argus-Leader, a newspaper published in the city of Sioux Falls, in said county, and that copies of said notice be addressed to the heirs of the said John McClellan, deceased, at their places of residence in this state and deposited in the Post Office with the postage thereon prepaid by the said petitioner, at least ten days before the time of said hearing.

Dated at Sioux Falls, S. D., this 26th day of February, A. D. 1900.

By the Court:

WM. A. WILKES,
Judge of County Court.

Attest:
W. J. CRISP, *Clerk*, [SEAL.]
By E. RILEY, *Deputy.*

Filed Apr. 23, 1900, Minnehaha County, S. D.
W. J. CRISP,
Clerk of Circuit Court.

EXHIBIT "C."

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In County Court.

In the Matter of the Estate of JOHN MCCLELLAN, Deceased.

The State of South Dakota sends greeting to John C. McClellan, James S. McClellan, William McClellan, Walter McClellan and Edmund McClellan, heirs at law and next of kin of John McClellan, deceased, and to all whom these presents may come.

Notice is hereby given that James S. McClellan has filed with the Judge of this Court, a petition praying that Letters of Administration of the Estate of John McClellan, deceased, be issued to the petitioner and Edmund C. Hinde of Sioux Falls, South Dakota; and that the order of this court made and filed February 8, 1900, directing that Letters of Administration shall issue to William Van Eps be set aside, and that said Letters of Administration to said William Van Eps, made and filed on the 8th day of February, 1900 be revoked and held for naught, and that Saturday, the 10th day of March, 1900, at 10 o'clock a. m., of said day being a day of a regular term of this court, to-wit: of the March term, 1900, at the courthouse in the city of Sioux Falls, county of Minnehaha has been set for hearing said petition, when and where any person interested may appear and show cause why the said petition should not be granted.

Dated at Sioux Falls, S. D., this 26th day of February, 1900.

WM. A. WILKES,
Judge of the County Court.

Filed Apr. 23, 1900, Minnehaha County, S. D.
W. J. CRISP,
Clerk Circuit Court.

Affidavit of Publication.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

E. H. Sanford, being first duly sworn, deposes and says: That he is a resident of the County of Minnehaha, and State of South Dakota; that the Daily Argus Leader is a daily newspaper of general circulation, printed and published in Sioux Falls, in said county and state, by Tomlinson & Day and is now and has been such newspaper continuously, during all the times hereinafter mentioned; that the affiant is and was, during *the all* times hereinafter mentioned the foreman of the printer of said newspaper in charge of the advertising department -hereof; and has personal knowledge of all the facts stated in this affidavit, and that the notice and advertisement, a printed copy of which is hereunto attached and made a part hereof,

was printed and published in the said newspaper four times; that the first publication of said notice in said newspaper aforesaid was on Tuesday the 27th day of February, A. D. 1900, and that the succeeding publications were severally on Thursday the 1st day of March, A. D. 1900, on Tuesday, the 6th day of March, A. D. 1900, on Thursday, the 8th day of March, 1900; that the fees charged for the printing and publication of said notice and advertisement in said newspaper as aforesaid were Six Dollars and Seventy-five cents and for this affidavit Twenty-five cents, and that said fees for the printing and publishing of said notice and advertisement, and for this affidavit, as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement inures to the benefit of the publishers of the said Argus Leader; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person, whomsoever. That the said newspaper is a legal newspaper as provided in Session Laws of 1893.

E. H. SANFORD.

Subscribed and sworn to before me this 10th day of March, 1900.

[SEAL.] SIOUX K. GRIGSBY,
Notary Public, Minnehaha County, South Dakota.

Filed Apr. 23, 1900, Minnehaha County, S. D.
W. J. CRISP,
Clerk Circuit Court.

EXHIBIT "D."

STATE OF SOUTH DAKOTA,
County of Minnehaha:

In County Court.

In the Matter of the Estate of JOHN MCCLELLAN, Deceased.

Order Denying the Application of James S. McClellan for the Revocation of Letters of Administration Heretofore Issued and the Issuance of Letters of Administration to Himself and Another.

This cause coming on regularly for hearing and the several parties in interest having been duly served, and appearing by their respective counsel, and the court having taken the evidence of the petitioner and others in his behalf, and hearing the argument of counsel both for the petitioner and the present administrator, William Van Eps, and being duly advised in the premises, is of the opinion that said petition should be denied. It is therefore ordered, that the petition of said James S. McClellan, to revoke the letters of

administration heretofore issued to the said William Van Eps be, and the same is hereby denied.

Dated this April 21st, A. D. 1900.

By the Court:

WM. A. WILKES, *Judge.*

To which order James S. McClellan duly excepted and his exception is allowed.

By the Court:

WM. A. WILKES, *Judge.*

Filed Apr. 23, 1900, Minnehaha County, S. D.
W. J. CRISP,
Clerk Circuit Court.

EXHIBIT "E."

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In County Court.

In the Matter of the Estate of JOHN MCCLELLAN, Deceased.

Letters of Special Administration.

In the Name of the State of South Dakota to All to whom these Presents shall Come or may Concern, Greeting:

Know ye that, whereas, John McClellan, deceased, late of the County of Minnehaha and State of South Dakota, aforesaid, died, leaving an estate to be administered within said County; and

Whereas, William Van Eps was appointed administrator of said estate and

Whereas said William Van Eps departed this life on or about the 12th day of July, 1906, and

Whereas, George T. Blackman being approved as Special Administrator of said estate, has given bond as required by law, which has been duly approved and filed in the county court in and for said County of Minnehaha.

We Therefore, Reposing full confidence in your integrity, and ability, do by these presents, constitute and appoint you, the said George T. Blackman, Special Administrator of the estate of John McClellan, deceased, and do hereby authorize and empower you to collect and preserve for the Executor or Administrator all the goods, chattels, debts and effects of the decedent, and all incomes, rents, issues, profits, claims and demands of the estate, to take charge and management thereof enter upon and preserve the same from damage, waste and injury, and, for such and all other necessary purposes, to exercise all the rights and powers of a special administrator herein as prescribed by law, and requiring you, in accordance with your bond, to make the return to said Court, at its first term here-

after, a true inventory and appraisement of all the estate of the decedent (except the homestead, if any) which has come to your possession or knowledge and truly account for all the estate of said decedent which shall be received by you, at the next term of said Court hereafter, and thereafter at any time when required by said Court, and to deliver the same to the person who shall afterward be appointed Executor or Administrator of the estate of said deceased, or to such persons as shall be legally authorized to receive the same, and to perform all orders and judgments of said Court by you to be performed in the premises.

Witness, the Hon. Dana R. Bailey, Judge of the County Court of the County of Minnehaha, S. D., with the seal thereof affixed the 17th day of September, A. D. 1906.

DANA R. BAILEY,
Judge of the County Court.

Attest:
L. A. KELLY, [SEAL.]
Clerk of the County Court.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

I, George T. Blackman, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of South Dakota, and that I will faithfully perform, according to law, the duties of Special Administrator of the estate of John McClellan, Deceased.

GEORGE T. BLACKMAN.

Subscribed and sworn to before me, this 17th day of September, A. D. 1906.

DANA R. BAILEY,
Judge of the County Court.

(Endorsed:) No. 538 S. D.—In the Circuit Court of the United States for the District of South Dakota, Southern Division,—John C. McClellan, James S. McClellan, William S. McClellan, Walter McClellan, and Edmund McClellan, Complainants, vs. George T. Blackman, Special Administrator of the Estate of John McClellan, Deceased, Defendant—Due and legal personal service of the within petition by copy thereof to us delivered is hereby admitted this 24″ day of November, 1908. Grigsby & Grigsby, Att'ys for Complainants, Geo. T. Blackman for George T. Blackman, Special Administration—Petition of State of South Dakota in Intervention—Filed Nov. 24, 1908, Oliver S. Pendar, Clerk, By Odin R. Davis, Deputy.

And afterwards, to-wit, on the 21st day of December, A. D. 1908, there was entered and appears of record on folio 344, Journal "I," Southern Division of said court, Proceedings on hearing of Order to Show Cause why State of South Dakota should not be allowed to intervene; which said Proceedings are in words and figures the following, to-wit:

No. 538. S. Div.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Defendant.

This matter came on for hearing on the Order to Show Cause why the State of South Dakota should not be allowed to intervene as a party to this action and the return of the complainants to said Order to Show Cause, and was argued by counsel; Messrs. Grigsby & Grigsby appearing on behalf of the complainants herein and U. S. G. Cherry, Esq., and Samuel W. Clark, Esq., appearing on behalf of the State of South Dakota, petitioner for leave to intervene; and the Court having listened to the argument of counsel and being duly advised in the premises, takes the matter under advisement pending its decision thereof.

And, to-wit, on the same day there was filed in the office of the clerk of said court, Return of Complainants on Order to Show Cause why State of South Dakota should not be allowed to intervene; which said eRturn is in words and figures the following, to-wit:

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Return of Complainants on Order to Show Cause.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Dakota, Southern Division, Sitting in Equity:

Now comes the complainants John C. McClellan, James S. McClellan, William S. McClellan, Walter McClellan and Edmund McClellan and make and file this their return to the order to show cause issued out of this court on November 24th, 1908, why the State of South Dakota should not be granted leave to intervene in this suit and why these complainants should not be required to answer the petition in intervention of said State of South Dakota and respectfully show to the Court:

I.

That the State of South Dakota has not in said Petition in Intervention nor upon the record before the Court, made, stated or established such a cause as doth or ought to entitle said state to any such order or relief as is hereby sought or prayed for, from or against these complainants or either of them, and that said Petition in Intervention is wholly and entirely without equity.

II.

That said Petition in Intervention fails to state facts sufficient to authorize or require this Court to take jurisdiction of the State of South Dakota, or of the subject matter of the claim made by the petitioner.

III.

That the petitioner prays for no relief from this Court in this suit except only that this Court declare that it has no jurisdiction to entertain the cause of action set up by the petitioner.

IV.

That the petition does not show that the petitioner has any interest in the matter in litigation of such a direct and immediate character that it will either gain or lose by the direct operation and effect of the decree of this Court in this suit.

V.

That it appears upon the face of the petition that the petitioner has a plain, speedy and adequate remedy at law which cannot properly be injected into a suit in equity.

VI.

That the petitioner in said petition has referred to certain matters which are of record and have not fully and fairly presented such matters of record to the Court and has so represented certain facts which are matters of record as to mislead the Court in regard to such matters as is more fully shown to the Court by the affidavit hereto annexed and which is made a part hereof.

Wherefore, these complainants reserving to themselves, all rights to which they would be entitled as if they had demurred or excepted to said Petition in Intervention, and protesting against this, their return to the Order to Show Cause herein, being considered in any other or different proceeding, prays the Court that the prayer of the State of South Dakota to be allowed to intervene herein, be denied and that said Petition in Intervention heretofore filed herein, be dismissed.

And these complainants further pray for such other, further and different relief as may be meet and equitable in the premises.

Dated this 21st day of December, 1908.

JOHN C. McCLELLAN,
JAMES S. McCLELLAN,
WILLIAM S. McCLELLAN,
WALTER McCLELLAN,
EDMUND McCLELLAN,
By GRIGSBY & GRIGSBY,
Solicitors and of Counsel for Complainants.

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Affidavit.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Melvin Grigsby, being first duly sworn, on oath says that to the best of his information and belief the statement made in the paragraph numbered "Fourth" of the petitioners' proposed petition in intervention herein in regard to the time when the deceased John McClellan left the County of Armagh in Ireland, in the Kingdom of Great Britain, is not true.

The said petition alleges that the deceased John McClellan left Ireland on or about the year 1850. The evidence in regard to deceased having left Ireland in the year 1850 was submitted in a trial before the County and Circuit Courts of the County of Minnehaha on behalf of one Mary A. Vine, who claimed to be a sister of deceased and entitled to letters of administration; that the said Mary A. Vine in a trial had in the Circuit Court, as set out in the petition, obtained a verdict from the jury in her favor and that the evidence submitted on her behalf showed that she had a brother John McClellan who had left Ireland in the year 1850; that afterwards a new trial was obtained upon a showing made that the evidence submitted by Mary A. Vine and on her behalf was false and untrue and a new trial was granted which resulted in a decision of the Circuit Court that the said Mary A. Vine was not a sister of the deceased John McClellan and that her brother, who it was claimed left Ireland in 1850, was not the deceased John McClellan, which decision was afterwards affirmed, as is set out in the petition herein, by the Supreme Court of the State of South Dakota, and that the statement of petitioners that the deceased John McClellan had left Ireland in

1850 is contrary to the decisions of the courts which are referred to by these petitioners in their petition.

Affiant further says that the "Thirteenth" paragraph of the petition in intervention, proposed to be filed herein, after setting up the fact that James S. McClellan applied to the Probate Court for the removal of William Van Eps as administrator and the appointment of himself and another in his stead, and after further setting out that a trial was had upon said petition before the County Court, used the following language:

"That by the said County Court it was then found and determined that the said James S. McClellan was not, nor were any of the complainants herein in any manner whatsoever related to the said John McClellan, deceased and were not entitled to any of the relief prayed for in said petition and their said petition was in all things overruled and denied."

The statement made in the above quotation that the County Court found that the complainants herein were not in any manner related to the said John McClellan, deceased, is not true. What the court did find is fully set out in Exhibit "D" attached to the said petition.

Affiant further states that the County Court in the trial above mentioned not only did not find complainants herein were not related to the deceased John McClellan, as is well known to the petitioners herein, but that the Court in the opinion filed at the time of the rendering of the decision, Exhibit "D" herein, used the following language:

"The evidence presented to the Court is widely, at variance with, and contradictory of that submitted by each of the other petitioners.

"Upon important and material points there exists irreconcilable differences.

"A decision now in favor of the petitioner would by the order of this Court adjudicate this family to be the true heirs of the deceased, and I am not sufficiently convinced upon this point to so hold.

"It is probable that there is more of evidence yet to be produced on behalf of the several contending claimants and so it seems best to allow the present administration to stand."

That petitioners must have known when they filed their petition herein that the facts in regard to the decision rendered by the County Court above referred to were as here stated by this affiant.

Affiant further says that in paragraph "Fifteenth" of the said petition the petitioners, after setting out that new trials were granted to different claimants, including James S. McClellan, one of the complainants herein, and a decision of the Circuit Court against all of said claimants and separate appeals on the part of James S. McClellan and Mary A. Vine to the Supreme Court of the state, and that the Supreme Court duly affirmed the decision appealed from, used the following language:

"That in and by the said order of the Supreme Court it was ordered and directed that in all further proceedings in the said Circuit Court and the said County Court in the said matter of the said estate of the said John McClellan, deceased, and until the property belonging to the said estate should be lawfully distributed as provided by

law the state's attorney within and for the said County of Minnehaha should be given notice of all further proceedings in relation to the said estate."

That no such order or judgment was ever made by the Supreme Court, as is alleged in the foregoing language used by petitioners; that in the opinion handed down by the Supreme Court and found in 107 N. W. 681, the Supreme Court used the following language:

"In view of the peculiar circumstances surrounding the estate involved in this proceeding, it will become the duty of the court having it in charge to insist upon the most efficient and honest administration until the property belonging to it shall have been lawfully distributed, and the state's attorney of Minnehaha county should have notice of all further proceedings in relation thereto. Rev. Civ. Code 1903 #1111."

That the only judgment rendered by the Supreme Court and duly entered as a judgment in the matter of the estate of John McClellan, excepting the judgment of the said court which granted a re-hearing to the appellant James S. McClellan, is that which is now of record in the Circuit Court of Minnehaha County, South Dakota, and is file number 1783 of said records, a copy of which, marked Exhibit "A," is hereto attached and made a part hereof.

The said paragraph "Fifteenth" of said petition further recites that in pursuance of the judgment of the Supreme Court a new trial was had in the Circuit Court of Minnehaha County by the said James S. McClellan in which new trial the State, by its attorneys, was allowed to participate and that as a result of said trial the judgment of said court was rendered adverse to the claimants of the said James S. McClellan, but said petitioners have failed to state to this court in their said petition that the said judgment of the Circuit Court last referred to was not rendered and was not entered as a judgment in the Judgment Book of the Circuit Court of Minnehaha County until after the bill of these complainants had been filed in this court and until after answer had been entered herein by the defendant and replication thereto had been duly filed.

Affiant further says that it is true that the firm of Grigsby & Grigsby, of which affiant is a member, acted as attorneys for the defendant herein, George T. Blackman, while the said George T. Blackman was engaged in making settlement with the executrix of the will of William Van Eps, deceased, in regard to the estate of John McClellan, deceased; that in making said settlement with the said executrix the said George T. Blackman was obliged to bring several suits in the Circuit Court of Minnehaha County and also to be there represented in certain appeals taken by said executrix from certain orders of the Probate Court of Minnehaha County; that all of these proceedings so taken by the said George T. Blackman were necessary for him to take in order to secure the possession of and to protect the estate of the said John McClellan, deceased, and that while acting as attorneys for the said George T. Blackman, the said firm of Grigsby & Grigsby were also attorneys for the said James S. McClellan and that the interests of the said James S. McClellan and that of the said

George T. Blackman, as administrator, were in no wise in conflict in any of such proceedings, but were identical and the same. That the said James S. McClellan, claiming to — an heir of the deceased John McClellan, was interested in the preservation of the estate and that the said firm of Grigsby & Grigsby have not acted as attorneys for the said George T. Blackman in any matters whatsoever wherein the interests of the said James S. McClellan and his relatives were adverse to or in conflict with the interests of the said George T. Blackman, as such administrator.

Affiant further says that neither John C. McClellan, William S. McClellan, Walter McClellan or Edmund McClellan, complainants herein, were parties to any of the proceedings heretofore mentioned as having been conducted in the courts of the State of South Dakota and that the only one of these complainants who was a party to such proceedings was the complainant James S. McClellan.

Affant further says that at the time that James S. McClellan filed his application in the County Court of Minnehaha County asking that the letters of administration issued to William Van Eps be revoked, and that letters be issued to himself and another on the ground that he was next of kin, and which proceedings are still pending, the said Walter McClellan and the said Edmund McClellan were both minors; that each of them was at that time under the age of twenty-one years, that no guardian was ever appointed to represent said minors in any of these aforementioned proceedings and that no attorney ever appeared for them.

Affiant further says that neither John C. McClellan nor William S. McClellan, complainants herein, has ever been a party to any of the proceedings heretofore mentioned as having occur-ed in the courts of the state of South Dakota.

Affiant further says that since the date of the entry of judgment against the said James S. McClellan in the Circuit Court of Minnehaha Cour*t*, which judgment has been entered since the Complaint, the Answer and Replication herein were filed in this court, due notice of intention to move for a new trial, as provided by the statutes of South Dakota, has been served by the attorneys of the said James S. McClellan and that no final decision has been entered and no final judgment rendered against the claims of said James S. McClellan in any of the courts of the state of South Dakota; that it is the intention of the attorneys of the said James S. McClellan to perfect an appeal from the said judgment of the Circuit Court of Minnehaha County last rendered in such proceedings and that pending such appeal the claim of the said James S. McClellan that he is entitled to administer the estate of the said John McClellan, deceased, will be pending in the courts of the State of South Dakota.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 19th day of December, 1908.

[NOTARIAL SEAL.]

JOHN KING,
Notary Public, South Dakota.

EXHIBIT "A."

File No. 1783.

In the Supreme Court, April Term, A. D. 1907.

STATE OF SOUTH DAKOTA, *ss:*

Present: Howard G. Fuller, Presiding Judge; Dick Haney and Dighton Corson, Judges of said Court, and the officers thereof.

In the Matter of the Estate of JOHN MCCLELLAN, Deceased.

This action coming on to be heard at the October A. D. 1906 Term of this Court, at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case upon the rehearing and argued by counsel and the Court having advised therein and filed its decision in writing,

It is considered, Ordered and Adjudged; That the order of the Circuit Court within and for Minnehaha County, appealed from herein, be and the same is hereby reversed as to the Arkansas claimants.

And it is further Ordered, That this action be and is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

Haney, J., dissenting.

By the Court,

HOWARD G. FULLER,
Presiding Judge.

Attest:

[SEAL.] FRANK CRANE, *Clerk.*

(Certificate follows by Clerk of Supreme Court that foregoing is a true copy of the Judgment of the Supreme Court in the above entitled action.)

(Endorsed:) In the Circuit Court of the United States for the District of South Dakota, Southern Division—John C. McClellan, et al, Complainants, vs. George T. Blackman, Special Administrator, Defendant—Return of Complainants on Order to Show Cause—Filed December 21, 1908, Oliver S. Pendar, Clerk.

And afterwards to-wit, on the 24th day of December, A. D. 1908, there was filed in the office of the Clerk of said Court, Memorandum Opinion of Court, which said Memorandum Opinion is in words and figures the following, to-wit:

United States Circuit Court, District of South Dakota.

JOHN C. MCCLELLAN et al., Complainants,
vs.
GEORGE T. BLACKMAN, Special Administrator, Defendant.

On Motion for Leave to Intervene by the State of South Dakota.

U. S. G. Cherry, Special Counsel.
S. W. Clarke, Attorney General and Alpha F. Orr, State's Attorney for Minnehaha County, South Dakota, for the State.
Grigsby & Grigsby, Solicitors for Complainants in Opposition to Motion.

CARLAND, *District Judge:*

The motion for leave to intervene has been submitted upon the petition filed in behalf of the State and the return to the order to show cause issued upon the filing of said petition. This action is one in equity brought by complainants to recover certain property now in the possession of the defendant. The sworn petition filed on behalf of the State sets forth that the property in question is the property of the State by reason of the fact that on — John McClellan, the former owner thereof, died intestate without heirs. If it were possible for the State in this action to establish the fact that said property had so devolved to the State the leave to intervene would be granted. It would however, be an idle proceeding to permit the State to intervene when it appears if it did intervene, it could not in this action establish title by escheat. The petition on file does not show any adjudication of any court vesting the title to said property in the State. No such adjudication can be made until some action is brought by the State to which all the world may be said to be parties and the claim of the State that John McClellan died intestate without heirs, established therein.

It is not necessary to determine the question on this motion as to whether under the laws of South Dakota, title vests immediately in the State upon the death of an intestate without heirs, or whether an action in court is necessary to so vest it, as in either event when the State seeks to assert its title, it must present some legal evidence of it. Whether the complainants may maintain their action can not be considered on this motion. This is a proceeding in equity however, and the court must act accordingly in view of the facts disclosed by the petition. The order will be that the motion to intervene be denied and the prosecution of this action be stayed for the period of ninety days to allow the State to commence a proper action to establish its title. In the event that such action is commenced within such period, this action will be further stayed until the determination of said action brought by the State. If no such action is commenced as herein specified then this action shall proceed as equity and justice may require.

(Endorsed:) No. 538 S. D.—United States Circuit Court District of South Dakota—John C. McClellan, et al, Complainants vs. George T. Blackman, Defendant—Memorandum—Filed Dec. 24 1908 Oliver S. Pendar, Clerk By Odin R. Davis, Deputy.

And afterwards, to-wit, on the 26th day of December, A. D. 1908, there was filed in the office of the Clerk of said Court, Præcipe for Appearance of John H. Gates, as Solicitor for Defendant; which said Præcipe for Appearance is in words and figures the following, to-wit:

In the United States Circuit Court for the District of South Dakota, Southern Division. In Equity.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, as Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Præcipe for Appearance.

To the Clerk of said Court:

You will please enter my appearance as Solicitor for the Defendant in the above entitled cause.

Dated Sioux Falls, S. D. December 26, 1908.

JOHN H. GATES,
Solicitor for Defendant.

(Endorsed:) #538—Jno. C. McClellan et al, vs. Geo. T. Blackman &c.—Præcipe for Appearance of Jno. H. Gates, as Solicitor for Def't.—Filed Dec. 26, 1908, Oliver S. Pendar, Clerk, By Odin R. Davis, Deputy.

And afterwards, to-wit, on the 4th day of January, A. D. 1909, there was filed in the office of the Clerk of said Court, Order overruling and denying motion of State of South Dakota for leave to intervene and staying prosecution for period of ninety days from Dec. 24, 1908; which said Order is in words and figures the following, to-wit:

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant; The State of South Dakota, Intervenor.

The above entitled cause coming on for hearing before the Court, pursuant to the petition filed herein by leave of the court, by the state of South Dakota for leave to intervene herein and upon the Order to Show Cause based upon the said petition returnable herein on the 21st day of December, 1908; S. W. Clark, Attorney General within and for the state of South Dakota, Alpha F. Orr, State's Attorney within and for the county of Minnehaha, and U. S. G. Cherry, as Special Counsel for the said state of South Dakota, all appearing in behalf of the said state of South Dakota, and Grigsby & Grigsby, solicitors for the complainants, appearing in opposition to the said petition and order to show cause, and the Court having heard the arguments of counsel and being fully advised in the premises; Now, on all the proceedings hereinbefore had it is

Ordered, That the motion of the said state of South Dakota for leave to intervene herein be and the same is overruled and denied and it is

Further ordered that the further prosecution of this action be and the same is hereby stayed for a period of ninety days from and after December 24th, 1908, for the purpose of allowing the state of South Dakota to commence a proper action or proceeding in the proper court to establish its alleged title and interest in and to the said property and estate of the said decedent and that in the event that such action is commenced within this time, then that this action and the prosecution thereof be further stayed until the determination of such action brought by the state of South Dakota and that in case no such action is commenced by the state of South Dakota within the time herein specified, then that this action shall proceed as equity and justice may require.

Done at Sioux Falls, South Dakota this 4th day of January, 1909.

By the Court,

JOHN E. CARLAND, *Judge.*

Attest:

[Seal of Court.]

OLIVER S. PENDAR, *Clerk,*
By ODIN R. DAVIS, *Deputy.*

(Endorsed:) No. 538 S. D.—Circuit Court of the United States, District of South Dakota, Southern Division—John C. McClellan,

et al. vs. George T. Blackman, Special Administrator of the Estate of John McClellan, Deceased—Order overruling and denying motion of State of South Dakota for leave to Intervene and staying prosecution for period of 90 days from Dec. 24, 1908—Filed January 4, 1909, Oliver S. Pendar, Clerk by Odin R. Davis, Deputy.

And afterwards, to-wit, on the 18th day of March, A. D. 1909, there was filed in the office of the Clerk of said Court, Affidavit of George J. Danforth for stay of proceedings; which said Affidavit is in words and figures the following, to-wit:

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, WALTER MCCLELLAN, EDMUND MCCLELLAN, Plaintiffs,
vs.
GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Affidavit on Application for Order to Stay Proceedings.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

George J. Danforth being first duly sworn deposes and says: that he is the duly appointed, qualified and acting States Attorney within and for the County of Minnehaha and State of South Dakota, and makes this affidavit not only in his own behalf as such officer, but is authorized to and does make this affidavit also in behalf of S. W. Clark, as Attorney General within and for the State of South Dakota; and this affiant states that, pursuant to the recent Act of the Legislature of the State of South Dakota, designated and known as "Senate Bill No. 262," an action has been commenced in the Circuit Court within and for the County of Minnehaha, in the Second Judicial Circuit in the State of South Dakota, wherein the State of South Dakota is complainant and Edward J. Taber, and all other persons known to have heretofore made, and all other persons known to be now making claim to any right, title or interest in the estate of the said John McClellan deceased, and all unknown persons having or claiming to have any such right, title or interest, whether such known or unknown persons be alleged creditors, heirs at law, next of kin, or to otherwise claim any interest in the said estate, are designated and named as defendants, and that the complaint in the said action has been filed in the office of the Clerk of the said court, and that the said complaint in all things complies with the terms and requirements and provisions as this affiant is informed and verily believes, of the said Senate Bill No. 262, and that a summons has been duly issued in the said action, directed to all the said defendants, and that the same has in good faith been placed in the hands of the Sheriff of the said County of Minnehaha,

with instructions to serve the same upon all the said defendants who can be found within the State of South Dakota, and that pursuant to the terms and provisions of the said act of the said legislature the said summons is now in process of publication in a news-paper designated by the order of the said Circuit Court, and that all the various steps and proceedings have been had necessary and proper to commence the said action by the said State of South Dakota as complainant against all the said defendants, and that the said action is now pending in said Circuit Court, and that it is the purpose and intention of this affiant as such officer, and of the said Attorney General to prosecute the said action in said State Circuit Court to final determination as promptly as the ends of justice will permit; that the purpose of the said action in said State Court is to obtain the final judgment and decree of the said State Circuit Court to the effect that the said John McClellan died intestate, that he left no heirs at law, next of kin or other persons capable of succeeding to the said estate, and that the said estate devolved and escheated to the State of South Dakota upon the death of the said decedent, and that there are no claims of creditors, and that the said State of South Dakota is entitled to, is the owner of, and is entitled to the posession of all the said estate.

Wherefore the said State of South Dakota prays the order of this court that the further prosecution of the above entitled action be stayed by the order of this court until the determination of the said action in the said State Circuit Court, or until the further order of this court, and for such other and further order in the premises as may be just and equitable.

GEORGE J. DANFORTH.

Subscribed and sworn to before me this 17th day of March, A. D. 1909.

[NOTARIAL SEAL.] E. B. SKINNER,
Notary Public.

(Endorsed:) Circuit Court of the United States, District of South Dakota, Southern Division—John C. McClellan vs. George T. Blackman, as Special Administrator of the estate of John McClellan, deceased—Affidavit of George J. Danforth for stay of proceedings—Filed Mar. 18, 1909, Oliver S. Pendar, Clerk, By Odin R. Davis, Deputy.

And, to-wit, on the same day there was filed in the office of the clerk of said Court, Order Staying Proceedings; which said Order is in words and figures the following, to-wit:

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, WALTER MCCLELLAN, EDMUND MCCLELLAN, Plaintiffs,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Order Staying Proceedings.

On the affidavit of George J. Danforth, States Attorney within and for the county of Minnehaha and State of South Dakota, and on all the files, pleadings and proceedings hereinbefore had, and on application of said Danforth as State's Attorney within and for the said County and S. W. Clark, Attorney General within and for state of South Dakota, and U. S. G. Cherry as special counsel for said State's Attorney and Attorney General,

It is hereby ordered that the further prosecution of the above entitled action by the said complainants be, and the same is hereby stayed until the determination of that certain action now pending in the Circuit Court within and for the county of Minnehaha in the state of South Dakota, wherein the state of South Dakota is complainant and Edward J. Taber and other persons therein designated by name as defendants, and all persons unknown having or claiming to have any right, title or interest in or to the estate of the said John McClellan deceased, are also defendants, has been determined or until the further order of the court herein.

Done at Sioux Falls, S. D. this 18th day of March, 1909.

JOHN E. CARLAND, *Judge.*

Attest:

[Seal of Court.]

OLIVER S. PENDAR, *Clerk.*
By ODIN R. DAVIS, *Deputy.*

(Endorsed:) No. 538 S. D.—Circuit Court of the United States, District of South Dakota, Southern Division—John C. McClellan, et al. vs. George T. Blackman, Special Administrator of the estate of John McClellan, deceased—Order staying Proceedings—Filed Mar. 18, 1909, Oliver S. Pendar, Clerk. By Odin R. Davis, Deputy.

And afterwards, to-wit, on the 29th day of March, A. D. 1909, there was filed in the office of the Clerk of said Court, Affidavit of Melvin Grigsby; which said Affidavit is in words and figures the following, to-wit:

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, WALTER MCCLELLAN, EDMUND MCCLELLAN, Plaintiffs,
vs.
GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Affidavit on Order to Show Cause.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Melvin Grigsby, being first duly sworn on oath, deposes and says that he is a member of the firm of Grigsby & Grigsby, solicitors and of counsel for complainants in the above entitled suit, in which suit the bill of complaint, the answer of the defendant, the replication of complainants to defendant's answer, the petition in intervention, the order granting leave to file petition in intervention, the memorandum opinion of the Court, the order staying proceedings dated January 4th, 1909, and the order staying proceedings dated March 18, 1909, are herein and hereby specifically referred to and made a part of this affidavit as they appear in the files and records of this court.

That these complainants alleging themselves to be the heirs at law and next of kin of one John McClellan, deceased, late of Sioux Falls, Minnehaha County, South Dakota, and who died therein on or about the 31st day of August, 1899, by their said bill of complaint against the defendant as special administrator of the estate of said deceased, which complaint was filed in this court September 8th, 1908, sought to establish their rights as heirs to the said estate and to have awarded to each his respective share thereof and that said defendant filed an answer herein on September 25th, 1908, whereby and wherein defendant alleged possession of the said estate as special administrator thereof and that he would, as such administrator, abide the judgment and order of this court in the premises, to which answer these complainants made and filed a replication in due form on October 28, 1908.

That on November 24th, 1908, the State of South Dakota, through the attorney general thereof and the states attorney in and for the County of Minnehaha therein, made and filed a petition in this suit asking leave of this court to intervene and contest as such State of South Dakota, the claims of these complainants to the estate of said deceased, in which petition in intervention said State of South Dakota alleged, among other things, that the estate of said deceased had escheated and devolved unto the said state and that the same was the property of the said state, and that the said state held title thereto, upon which petition this court granted an order for the hearing thereof, which hearing came on for argument before the court on the 21st day of December, 1908, and that on the 24th

day of December, 1908, this court filed its memorandum opinion and decision denying the petition of the said State of South Dakota for leave to intervene in this suit and on the 4th day of January, 1909, pursuant to such opinion this court made and filed its order staying all proceedings in this suit for ninety days from and after December 24th, 1908, for the purpose of allowing the State of South Dakota to commence a proper action in a proper court to establish its alleged title to said property of the said estate and that in the event that such action be commenced then that this action be further stayed until the determination of such action.

That in said memorandum opinion heretofore referred to and also in the said order of this court heretofore referred to the court found in effect that no title to the estate of said deceased had vested or could vest in the said State of South Dakota until said state had in the proper forum obtained a judgment against all claimants to the said estate adjudging an escheat thereof. That thereafter and on or about the 13th day of March, 1909, the said State of South Dakota filed its summons and complaint in the Circuit Court of the Second Judicial Circuit in and for the County of Minnehaha against one Edward J. Taber, et al. as defendants, the above named complainants obtained an order for the service by publication of the said summons upon the said defendants, a true copy of which order, summons and complaint are hereto attached and marked Exhibit "A," specifically referred to and made a part hereof; and that on or about said date said State of South Dakota caused said summons to be published in the Sioux Falls Daily Press and are now publishing the same in said newspaper as a service upon the defendants therein named of the summons in said action.

That your deponent is informed and verily believes the said action in the said Circuit Court of Minnehaha County has been commenced by the State of South Dakota for the purpose of escheating the property of the estate of John McClellan, deceased, and that said ateion has been commenced by the said State of South Dakota particularly for the purpose of preventing the trial of the suit brought before your honors as above entitled.

That after filing the said summons and complaint in the Circuit Court of Minnehaha County the states attorney thereof and the attorney general of the said state appeared before your honors on the 18th day of March, 1909, and procured a further order staying proceedings in the suit first above entitled until the determination of that certain action brought by the State of South Dakota in the Circuit Court of Minnehaha County, or until the further order of this court; that said order was obtained without notice to these complainants or to their attorneys and without an opportunity on the part of these complainants to be heard in opposition thereto.

Your deponent further says that immediately following the death of the said John McClellan in the city of Sioux Falls on August 3, 1899, several petitions praying the issuance of letters of administration were filed with the Honorable Wm. A. Wilkes, Judge of the County Court of Minnehaha County, said court having jurisdiction thereof, by parties claiming as next friend, as creditor, and as relative; that among others there was filed on November 13th, 1899, a

petition of Margaret Hammill and Mary McClellan of the county of Armagh, Ireland, claiming to be nieces of said deceased, and which petition ultimately requested the appointment of William Van Eps as administrator, and on December 11, 1899, there was further filed a petition of Mary A. Vine of Grand Rapids, Michigan, claiming to be a sister of the deceased and praying for the appointment of Cyrus Waltz as administrator; the said Mary A. Vine appearing in said court and in subsequent proceedings hereinafter set forth in person and by her counsel U. S. G. Cherry, who now appears before your honors and in the aforesaid action of escheat as special counsel to the attorney general of South Dakota and the states attorney of Minnehaha County.

That the several petitions aforesaid coming on for hearing both on behalf of Mary McClellan, Margaret Hammill, Mary A. Vine and others, the said County Court on February 9, 1900, upon motion of attorneys for said Mary McClellan and Margaret Hammill appointed William Van Eps as administrator of the said estate, from which order Mary A. Vine appealed to the Circuit Court of the Second Judicial Circuit of Minnehaha County in the State of South Dakota.

That after such appeal had been perfected and on February 24th, 1900, the above named James S. McClellan of Little Rock Arkansas, filed in the said County Court a petition for the revocation of the letters which had been issued to William Van Eps and prayed the issuance of letters of administration to himself and another, claiming in his petition to be the son of the deceased, and which petition coming on for hearing before said County Court was on the 21st day of April, 1900, denied by said court from which order denying said petition the said James S. McClellan forthwith perfected an appeal to the said Circuit Court of Minnehaha County; that at the following term of the said Circuit Court held on the 26th day of September, 1900, the said appeals of Mary A. Vine and James S. McClellan were, over the objection of said James S. McClellan, consolidated and tried as one case, all questions of fact being submitted thereat to a jury, and on October 12, 1900, a verdict was rendered in favor of Mary A. Vine and judgment entered therein in accordance with said verdict.

That on the 16th day of March, 1901, the said Circuit Court, Hon. Joseph W. Jones presiding, upon motion of attorneys for said Margaret Hammill and Mary McClellan and said James S. McClellan vacated and set aside, the said verdict and granted a new trial of said causes, both to said James S. McClellan and Mary McClellan and Margaret Hammill, which second trial came on for hearing before the Hon. A. W. Campbell, judge presiding, without a jury on the 11th day of June, 1901.

That this trial resulted in findings by the court that neither Mary McClellan, Margaret Hammill, Mary A. Vine or James S. McClellan were heirs or next of kin of the said deceased, to which findings an exception was entered by each of said parties separately and all of said parties named thereupon separately moved said court to vacate and set aside the said findings and grant a new trial of the said cause, which motions were by the said Circuit Court during the month of December, 1901, separately overruled and denied and that

from the order denying said motions for new trial the said Mary A. Vine and the said James S. McClellan perfected separate appeals to the Supreme Court of the said State of South Dakota, which separate appeals were placed upon the calender of said court for hearing at the October, 1902, term thereof.

That on April 3, 1906, the said Supreme Court filed its decision and judgment affirming said Circuit Court of Minnehaha County in words as shown in the 107 N. W. Rep. at page 681, thereof. That no further proceedings were taken on behalf of the said Mary A. Vine, but that within thirty days thereafter the said James S. McClellan duly filed in said Supreme Court a petition for a re-hearing of his said appeal, which petition was by the court granted and his said appeal again submitted to the said Supreme Court, and on April 2, 1907, the said court entered its opinion and decision reversing the order of said Circuit Court refusing the said James S. McClellan a new trial of his said cause and granting to the said James S. McClellan a new trial thereof, which opinion and decision of said Supreme Court is in words as shown in the 111 N. W. Rep. at page 540 thereof, *by* both of which opinions of said Supreme Court the said James S. McClellan hereby specifically refers.

That during the several hearings and appeals above set forth the said William Van Eps continued as administrator of the said estate until on or about the 12th day of July, 1906, when the said William Van Eps died and on or about September 26, 1906, the above named George T. Blackman was by the County Court of said Minnehaha County appointed as special administrator of the estate of said deceased.

That pursuant to the opinion and decision of the said Supreme Court a new trial of said James S. McClellan came on for hearing before said Circuit Court, the Hon. Chas. E. Whiting presiding, on the 11th day of February, 1908, at which time said James S. McClellan appeared in person and by his attorneys, Grigsby & Grigsby, and said George T. Blackman by his attorneys Messrs. Ai-kens & Judge, and that thereupon and before the commencement of said trial the state's attorney within and for the said county of Minnehaha appeared before said court together with the attorney general of said State of South Dakota and said U. S. G. Cherry, as special counsel, and presented to the court an information and petition and motion on the part of the State of South Dakota for leave to appear and take part in said trial, and to be permitted to produce and offer evidence in opposition to the case of said James S. McClellan, and to contest the petition of the said James S. McClellan, which motion, information and petition set forth substantially the same state of facts and grounds upon which the said State of South Dakota appeared before your honors with a petition in intervention in the suit at bar.

That the said James S. McClellan thereupon made, filed and entered of record his objections to granting of the petition of the said State of South Dakota for substantially the same reasons as he has heretofore objected to the petition in intervention in this court in the suit at *at* bar, but that said Circuit Court over the objections of said James S. McClellan granted the motion of said state of South

Dakota and permitted and allowed the said State of South Dakota to appear and take part in the said trial and to produce and offer evidence in opposition to the case of said James S. McClellan and to cross-examine his witnesses and in all things participate and take part in said trial in the same manner as a party to any action at law or equity as tried in said court.

That thereafter and on the 18th day of November, 1908, the said Court on motion of said State of South Dakota made, filed and entered findings of fact, conclusions of law and judgment against the said James S. McClellan and dismissed the appeal of said James S. McClellan from the County Court of Minnehaha County and ordered that the record be returned to said County Court of Minnehaha County for further proceedings according to law.

That thereupon the said James S. McClellan prior to the staying of all proceedings in said Circuit Court of Minnehaha County and within the time allowed by law, and pursuant to the statutes of the State of South Dakota, duly, made, filed and served a notice of intention to move for a new trial in the said court and that said Judgment be vacated and set aside and in due time, pursuant to said statutes, the said James S. McClellan prepared and served a proposed bill of exceptions therein and the said bill of exceptions is now in the hands of the said court for a settlement thereof, and that the said James S. McClellan has in good faith and within the statutory time taken all the necessary proceedings under the laws of the State of South Dakota prior to making a formal motion for new trial upon his petition for letters of administration and that the said James S. McClellan is not in default in said Circuit Court of Minnehaha County and intends within the statutory time to present his motion for new trial and that in case said motion for new trial is over-ruled and denied the said James S. McClellan will within the time allowed by law perfect an appeal to the Supreme Court of the state of South Dakota, as in such cases made and provided; that your deponent is fully advised as to the merits of the case of said James S. McClellan and verily believes that said James S. McClellan is the son of said John McClellan, deceased, and entitled to the administration of the said estate and that said appeal will, if perfected, be taken to the Supreme Court of the State of South Dakota in good faith and not for the purpose of delay.

Your deponent further says that all of the proceedings heretofore set forth as having been taken by the said James S. McClellan were had and taken by him prior to the 13th day of March, 1909, on which date the State of South Dakota filed its said complaint in the Circuit Court of the County of Minnehaha and deponent further says that the said State of South Dakota, over the objection of said James S. McClellan, was permitted and allowed by the said Circuit Court of said Minnehaha County to appear in said court as a party in intervention and resist the application of the said James S. McClellan for letters of *of* administration aforesaid and that one of the grounds upon which the said James S. McClellan expects to secure a new trial of said action is the ruling of said court permitting said State of South Dakota to intervene in said action, which ruling is substantially opposite to the ruling of your honors upon

the same state of facts as shown by the petition of the said State of South Dakota for leave to intervene in the suit at bar.

That by reason of the facts hereinbefore set out the estate of said John McClellan, deceased, has not devolved nor escheated to the State of South Dakota and that inasmuch as the claim of the said James S. McClellan for letters of administration thereof is still pending in said Circuit Court of Minnehaha County, no proper action can be brought by said State of South Dakota to escheat said estate until the final determination of the case of said James S. McClellan in said State Court, in which case said State of South Dakota has appeared and intervened and is contesting as a claimant and party.

Your deponent further says that the allegations contained in paragraphs fourth and seventh of said complaint hereto attached are not true in fact and that no final adjudication of any court has been made establishing such allegations as facts.

Your deponent further says that neither of the parties to this suit in this court was a party to any action or matter heretofore brought in the Probate Court of Minnehaha County except only the complainant James S. McClellan who in his petition originally filed in the said Probate Court prayed that letters of administration be issued to him, and that two of the complainants herein were minors at that time and for a number of years thereafter.

Your deponent further says that the suit at bar was and is brought in good faith for the purpose of more speedily determining the claims of these claimants in and to the estate of said deceased and that this court, having jurisdiction thereof and having acquired such jurisdiction before the commencement of any actions of escheat by the State of South Dakota, should proceed to hear and determine such suit and that to deny these complainants' right to be heard at this time would occasion to them needless delay and great expense and will require them to litigate with the State of South Dakota matters in which the said State of South Dakota has no interest whatever and can have no interest until it has first been finally determined by a court of competent jurisdiction that these complainants are not the sons and grandsons of the said John McClellan, deceased, as alleged in their complaint.

Your deponent further says the several orders staying proceedings herein were not prayed for either by these complainants or by the State of South Dakota, and that these complainants had no reason to expect that any such orders would be made and have had no opportunity to be heard in this court in opposition to the making and entry of such orders.

Wherefore and in especially for the reason that said orders or either of them are not appealable your deponent on behalf of said complainants prays the court that an order may be issued and directed to the said State of South Dakota requiring the said State to show cause before this Court on a day certain, therein named, why the said order staying further proceedings in this suit should not be vacated and set aside and why this suit should not proceed immediately to a speedy hearing and determination of the same.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 29 day of March, 1909.
[NOTARIAL SEAL.] A. B. MULLER,
Notary Public, South Dakota.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In Circuit Court, Second Judicial Circuit.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
EDWARD J. TABER, HOSMER H. KEITH, J. C. CARPENTER, WILLIAM R. Todd, State Banking & Trust Co., a Corporation; John Powers, Moses Kaufman, Tolerton & Stetson Co., a Corporation; Margaret Carruthers, John Barnes, Wm. McClellan, John McClellan, Thomas McClellan, George McClellan, Jane McClelland Tether, Frances McClellan, Margaret McClellan Bulkley, Thomas G. McClellan, Mary A. Vine, Margaret Hammill, Mary McClellan, James S. McClellan, John C. McClellan, William McClellan, Walter McClellan, Edmund McClellan, and George T. Blackman, as Special Administrator of the Estate of John McClellan, Deceased, and All Persons Who Have or Claim to Have Any Interest in the Estate of John McClellan, Deceased, as Heirs, Creditors, or Otherwise, Defendants.

Order.

The Summons and complaint in the above entitled action having been filed with the Clerk of the Circuit Court in and for the County of Minnehaha and State of South Dakota, now upon motion of S. W. Clark, Attorney General, and George J. Danforth, State's Attorney of Minnehaha County, attorneys for complainant herein, it is

Ordered that said summons, in the form as filed in this court, be published in the Sioux Falls Daily Press a legal newspaper printed and published in the city of Sioux Falls, County of Minnehaha and State of South Dakota, once in each week for six successive weeks and said newspaper is hereby designated as the newspaper most likely to give notice of the pendency of said action; and further

Ordered that after the publication of said summons in said newspaper as aforesaid, and after the completion of the publication thereof for six successive weeks, then that due proof of said publication by affidavit be returned and filed in this court.

Dated at Sioux Falls this 13th day of March, 1909.

By the Court:

JOSEPH W. JONES, *Judge.*

Attest:
W. C. McCONNELL, *Clerk,*
By J. B. LUNN, *Deputy.*

Filed Mar. 13, 1909, Minnehaha County, S. D.
W. C. McCONNELL,
Clerk Circuit Court.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In Circuit Court, Second Judicial Circuit.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
EDWARD J. TABER, HOSMER H. KEITH, J. C. CARPENTER, WILLIAM R. Todd, State Banking & Trust Co., a Corporation; John Powers, Moses Kaufman, Tolerton & Stetson Co., a Corporation; Margaret Carruthers, John Barnes, Wm. McClellan, John McClellan, Thomas McClellan, George McClellan, Jane McClelland Tether, Frances McClellan, Margaret McClellan Bulkley, Thomas G. McClellan, Mary A. Vine, Margaret Hammill, Mary McClellan, James S. McClellan, John C. McClellan, William McClellan, Walter McClellan, Edmund McClellan, and George T. Blackman, as Special Administrator of the Estate of John McClellan, Deceased, and All Persons Who Have or Claim to Have Any Interest in the Estate of John McClellan, Deceased, as Heirs, Creditors, or Otherwise, Defendants.

Summons.

The State of South Dakota to the above named defendants:

You, and each of you, are hereby summoned and required to answer the complaint of the complainant in the above entitled action, a copy of which is hereto attached and herewith served upon you, and to serve a copy of your answer thereto upon the subscribers at the office of George J. Danforth, in the city of Sioux Falls, Minnehaha County, South Dakota, within thirty days after the date of the service of this sum-ons upon you, exclusive of the day of service, and in said answer to set forth the nature of your claim against the estate of John McClellan, deceased. And you are hereby notified that if you fail to appear and answer said complaint within thirty days after the date of the service of this summons upon you, exclusive of the day of service, as aforesaid, the complainant will apply to the court for the relief demanded in its complaint.

Dated at Sioux Falls, S. D. this 11th day of March, 1909.

S. W. CLARK,
Attorney General.

GEORGE J. DANFORTH,
State's Attorney, Minnehaha County.
U. S. G. CHERRY,
Of Counsel, Attorneys for Complainant.

Filed Mar. 13, 1909, Minnehaha County, S. D.

W. C. McCONNELL,
Clerk Circuit Court.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In Circuit Court, Second Judicial Circuit.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
EDWARD J. TABER, HOSMER H. KEITH, J. C. CARPENTER, WILLIAM R. Todd, State Banking & Trust Co., a Corporation; John Powers, Moses Kaufman, Tolerton & Stetson Co., a Corporation; Margaret Carruthers, John Barnes, Wm. McClellan, George McClellan, John McClellan, Thomas McClellan, Jane McClelland Tether, Frances G. McClellan, Margaret McClellan Bulkley, Thomas G. McClellan, Mary A. Vine, Margaret Hammill, Mary McClellan, James S. McClellan, John C. McClellan, William McClellan, Walter McClellan, Edmund McClellan, and George T. Blackman, as Special Administrator of the Estate of John McClellan, Deceased, Defendants.

Complaint.

Complainant for its cause of action against the defendants, and each of them, makes and files this, its verified complaint, and shows unto the court as follows:

I.

That John McClellan, late of the county of Minnehaha and state of South Dakota, died intestate at the city of Sioux Falls, in said county and state on or about the 3rd day of August, 1899, and that said deceased at the time of his death was a citizen of the state of South Dakota and a resident in the city of Sioux Falls in the county of Minnehaha in said state and that he had been a citizen of and a resident within the state of South Dakota at all times since the year 1857 and up to the time of his death in the year 1899.

II.

That the said John McClellan died seized of real property consisting of farm lands, business and residence properties and city and town lots, situated principally in the county of Minnehaha and in the city of Sioux Falls, and personal property consisting principally of moneys on hand, bonds, notes, and accounts, and all of which estate real and personal is of the approximate value of ($40,000.) Forty Thousand Dollars.

III.

That after the death of the said John McClellan proceedings were had in the county court of Minnehaha County, South Dakota, wherein and whereby one William Van Eps was appointed general administrator of said estate and as such administrator took into his charge and possession all of the property belonging to said estate and allowed and paid claims of creditors and converted the personal property into cash and remained in possession of both the real and per-

sonal property belonging to said estate until during or about the 12th day of July, 1906, when the said William Van Eps died; that soon thereafter, George T. Blackman of Sioux Falls, South Dakota, one of the defendants above named, was appointed special administrator of the estate of John McClellan, deceased, and that he took possession of all of said estate, both real and personal, under direction of the county court, and that he is now in sold possession thereof and holds the same as such special administrator, subject to the order of the courts.

IV.

That the said John McClellan of Minnehaha County, South Dakota, died without issue; that he was never married; and that he left no one capable of succeeding to said estate, but that he died without heirs at law or next of kin and that he left no one capable of succeeding to the said estate under the succession laws of this state, and that by reason of the premises there is a defect of heirs of the said John McClellan, and that his estate at his death devolved and escheated to the state of South Dakota, and that by reason thereof the state of South Dakota has right by law to said estate and the whole thereof.

V.

That the claims of the creditors of the estate of John McClellan, deceased, have all been paid, and that said estate, after the payment of said claims is of the approximate value of Forty Thousand Dollars ($40,000) as aforesaid.

VI.

That the defendants Edward J. Taber, Hosmer H. Keith, J. C. Carpenter, William R. Todd, State Banking & Trust Co., a corporation, John Powers, Moses Kaufman and Tolerton & Stetson Co., a corporation, have or claim to have an interest in said estate by reason of being creditors thereof, but complainant alleges that the claims of the above named persons as creditors are groundless and invalid and are not proper claims against the estate of said John McClellan, deceased.

VII.

That the defendants, Margaret Carruthers, John Barnes, Wm. McClellan, John McClellan, Thomas McClellan, George McClellan, Jane McClelland Tether, Frances McClellan, Margaret McClellan, Thomas G. McClellan, Mary A. Vine, Margaret Hammill, Mary McClellan Bulkley, James S. McClellan, John C. McClellan, William McClellan, Walter McClellan and Edmund McClellan, and each of them, claims to be a relative of and heir at law of John McClellan, deceased, but complainant alleges that said claims of the above defendants, and each of them, are wholly untrue and that none of said defendants, nor either of them, are heirs at law or related in any way whatsoever to John McClellan, deceased, and that their claims are each and all wholly unfounded and that none of said defendants have any claim, right, title or interest in and to the estate of said John McClellan, deceased, or any part thereof.

Wherefore, complainant prays that the title and ownership of all the property belonging to the estate of John McClellan be determined and quieted in it and that complainant, the state of South Dakota, be declared to be the sole owner of all of said property belonging to said estate, both real and personal, and that the State of South Dakota, through its duly authorized officers and attorneys, be let into possession of said estate and that the party in possession, the said George T. Blackman, as such special administrator, be ordered and directed to pay over and deliver to the officers of the State of South Dakota for its benefit, all the personal property belonging to the said estate and all the muniments of title, abstracts, papers and other instruments affecting the title to the real property belonging to said estate, and that he made a full and true accounting of all the property that has come into his hands as such special administrator to the attorneys and officers of the state of South Dakota; that the above named defendants, and each of them, be estopped and barred from asserting any further claim of title or ownership or interest in and to said estate, or any part thereof, and that their claims, and each of them, and all persons claiming through or under them, be declared to be invalid and groundless and of no effect as against the title of complainant; and if any of said above named defendants appear and join issue as to the allegations in this complaint, then that complainant have judgment against such defendants for its costs and disbursements herein, and for such other and further relief as to the court shall seem equitable and just.

S. W. CLARK,
Attorney General, and
GEORGE J. DANFORTH,
State's Attorney, Minnehaha County,
Attorneys for Complainant.

U. S. G. CHERRY,
Of Counsel.

Filed Mar. 13, 1909, Minnehaha County, S. D.
W. C. McCONNELL,
Clerk Circuit Court.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

George J. Danforth, being first duly sworn upon his oath deposes and says that he is the duly appointed, qualified and acting State's Attorney within and for the county of Minnehaha County, South Dakota, and that he makes this verification for and on behalf of the state of South Dakota; that he has read the above and foregoing complaint and knows the contents thereof and that the matters therein stated are true according to his best knowledge, information and belief.

GEORGE J. DANFORTH.

Subscribed and sworn to before me this 11th day of March, A. D. 1909.

[NOTARIAL SEAL.]

E. B. SKINNER,
Notary Public.

Filed Mar. 13, 1909, Minnehaha County, S. D.
W. C. McCONNELL,
Clerk Circuit Court.

(Endorsed:) No. 538 S. D.—Circuit Court of the United States, District of South Dakota, Southern Division—John C. McClellan, et al. vs. George T. Blackman as Special Administrator—Affidavit of Melvin Grigsby—Filed Mar. 29, 1909, Oliver S. Pendar, Clerk By Odin R. Davis, Deputy.

And, to-wit, on the same day there was filed in the office of the clerk of said Court, Order to Show Cause why Order staying proceedings in this Court should not be vacated and set aside; which said Order is in words and figures the following, to-wit:

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Order to Show Cause.

To the State of South Dakota and Attorney General Thereof, and the County of Minnehaha and State's Attorney thereof:

You will please take notice that upon consideration of the annexed affidavit and petition of Melvin Grigsby, the court being duly advised in the premises and reason therefor appearing, it is hereby;

Ordered that you and each of you show cause before this court at the U. S. Postoffice building in the City of Sioux Falls, County of Minnehaha and State of South Dakota, on the 12th day of April, 1909, at ten o'clock A. M. of that day why the orders of this court staying proceedings herein, dated respectively January 4, 1909, and March 18, 1909, should not be vacated and set aside and why this suit should not proceed immediately to a speedy hearing and determination of the same, according to the statutes of the United States and rules of this court; that a copy of this order and the said affidavit and petition of said Melvin Grigsby be forthwith served upon George T. Danforth, state's attorney within and for said County and State.

Dated this 29th day of March, 1909.

By the Court:

JOHN E. CARLAND, *Judge.*

Attest:
OLIVER S. PENDAR, *Clerk,*
By ODIN R. DAVIS, *Deputy.*
[SEAL OF COURT.]

(Endorsed:) No. 538 S. D.—Circuit Court of the United States, District of South Dakota, Southern Division—John C. McClellan et al. vs. George T. Blackman, Special Administrator of the estate of John McClellan, deceased—Order to Show Cause why Order staying proceedings in this Court should not be vacated and set aside—Filed Mar. 29, 1909, Oliver S. Pendar, Clerk By Odin R. Davis, Deputy.

And afterwards, to-wit, on the 14th day of April, A. D. 1909, there was filed in the office of the clerk of said court, Affidavit of U. S. G. Cherry; which said Affidavit is in words and figures the following, to-wit:

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Affidavit.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

U. S. G. Cherry being first duly sworn deposes and says; he is special counsel for the Attorney General of the State of South Dakota, and the State's Attorney within and for the County of Minnehaha in the above entitled action, and makes this affidavit at their request, and that the same is made by this affiant for the reason that he is more familiar with the facts hereinafter stated.

Affiant says that the statement contained in the affidavit of Melvin Grigsby dated March 29th, 1909, upon which the order to show cause herein bearing same date was based, to the effect that said last action had been commenced by the said State of South Dakota particularly for the purpose of preventing the trial of this suit is not true, and this affiant states the fact to be that the said action was commenced by the State of South Dakota in the said Circuit Court within and for the said State of South Dakota for the purpose of obtaining the judgment of that court to the effect that the estate of the said John McClellan deceased, at the time of his death devolved and escheated to the State of South Dakota by reason of a defect of heirs, and that the said action was commenced in pursuance of the order of this court made on the 4th day of January, 1909, wherein this court ordered that the further prosecution of this action be stayed for a period of ninety days from and after the 24th day of December, 1908, for the purpose of allowing the state of South Dakota to commence a proper action or proceeding in the proper court to establish its alleged title to and interest in the property composing the estate of the said John McClellan, deceased, and wherein

this court ordered further that in the event such action should be commenced within said time in said State Court, then that this action and the prosecution thereof would be stayed until the determination of such action brought by the said State of South Dakota, and further ordered that in case no such action should be commenced by the State of South Dakota within said time, then that this action should proceed as equity and justice might require.

And this affiant further states that after the appeal was perfected to the Supreme Court of the State of South Dakota from the decision and order of the Circuit Court within and for the county of Minnehaha in the State of South Dakota in the matter, or proceeding entitled "In the matter of the estate of John McClellan deceased", in said court, which appeal was perfected by the said James S. McClellan, one of the complainants herein, and after a similar appeal was perfected by the claimant Mary A. Vine to said Supreme Court from the said order and decision of the said Circuit Court to the said Supreme Court, which decision and order found and determined in substance and effect that the said James S. McClellan and his co-complainants herein were not the sons of or related in any way to the said John McClellan deceased, and that the said Mary A. Vine and her brothers and sisters were not the brothers and sisters of the said John McClellan deceased, the said supreme court on or about the 3d day of April, 1905, rendered its decision and filed its order and opinion in the said case, and in the said opinion directed as follows:

"In view of the peculiar circumstances surrounding the estate involved in this proceeding, it will become the duty of the court having it in charge to insist upon the most efficient and honest administration until the property belonging to it shall have been lawfully distributed, and the State's Attorney of Minnehaha county should have notice of all further proceedings in relation thereto. Rev. Civ. Code 1903, Sec. 1111."

That thereafter a petition was filed for a re-hearing in the said Supreme Court in said matter by said Grigsby & Grigsby, and that pursuant to the order and direction of the said Supreme Court copies of the said petition were served upon the Attorney General of the state of South Dakota, and upon the State's Attorney of the county of Minnehaha and that such re-hearing was granted by the said Supreme Court, and that upon such re-hearing the said State of South Dakota appeared in the said Supreme Court and was represented by the Attorney General by whom oral argument was made therein, and by whom briefs in behalf of the said state of South Dakota were filed, and the said state of South Dakota in all things participated upon such re-hearing in the said Supreme Court, and that the said Supreme Court granted a new trial of the said matter, its order granting such new trial being based entirely upon errors in law in the matter of rulings upon the admission and exclusion of evidence in the former trial of the said matter in the said Circuit Court within and for the state of South Dakota.

And that the said cause was remanded to the said Circuit Court within and for the said State of South Dakota for a new trial therein,

and that upon such new trial the said Chas. S. Whiting, Judge of the Circuit Court within and for the ninth judicial circuit in the state of South Dakota presided at the request of Joseph W. Jones, the Judge of the circuit court within and for the said county of Minnehaha, and that prior to the coming on of the said cause for trial a petition or information was served in behalf of the state of South Dakota upon the said Grigsby & Grigsby and notice of a motion based thereon, and upon all prior proceedings had in the said matter, was served upon said attorneys returnable on the 11th day of February, 1908, and that on the hearing of the said motion an order was made by the said State Circuit Court a true and correct copy of which is hereto attached, marked "Exhibit B" and is hereby referred to and made a part hereof.

And this affiant further states that the portion of the affidavit of said Melvin Grigsby is untrue wherein it states in substance that neither of the complainants to this suit in this court was a party to any action or matter heretofore brought in the probate court of Minnehaha County, except only the complainant James S. McClellan.

And this affiant states the fact to be that on or about the 9th day of August, 1899 the county court within and for the county of Minnehaha, being the court of probate having jurisdiction of the matter of the estate of said John McClellan deceased, deeming it necessary and advisable that an attorney be appointed to represent and care for the interests of such unknown, non-resident heirs and other parties not before the court, and to protect such rights or interests of such unknown, non-resident heirs as might thereafter be determined upon, made and entered its order appointing Sioux K. Grigsby, one of the members of the firm of Grigsby & Grigsby as the attorney for all such un-known, non-resident heirs or claimants and that the said Sioux K. Grigsby thereupon entered upon his duties as such attorney, and is now the duly appointed attorney for all such un-known, non-resident heirs or claimants, and that as this affiant is informed, and upon such information and belief alleges the facts to be, it was by reason of such appointment of the said Sioux K. Grigsby as such attorney for un-known and non-resident heirs that the said James S. McClellan in his own behalf and in behalf of the other complainants herein, applied to the said Sioux K. Grigsby and procured him or the firm of Grigsby, Wright & Grigsby of which the said Sioux K. Grigsby was a member, to prepare and file the petition of the said James S. McClellan in the said county court for revocation of the letters of administration which had theretofore been issued by the county court of the said county of Minnehaha to William Van Eps as administrator of the said estate, and that the said James S. McClellan when it was first determined by him and his said co-complainants herein to make claim of ownership to the said estate, communicated thr-u- the United States mail and by letter to W. A. Wilkes, the Judge of the said county court, asserting that he and his said co-complainants herein were the heirs of the said John McClellan deceased, and inquiring what action or proceeding he should take in the premises,

and that his said letter and communication was referred to the said Sioux K. Grigsby as such attorney for un-known and non-resident heirs, and that it was upon the advice of the said Grigsby, Wright & Grigsby that the said petition was filed in the name of the said James S. McClellan only, and that thereafter and after an appeal had been perfected by the said James S. McClellan to the said Circuit Court within and for the said county of Minnehaha from the order of the said county court denying the petition of the said James S. McClellan for the revocation of the said letters of administration so issued to the said William Van Eps, and at the time of the taking of depositions to be used upon the trial of the said matter in the said circuit court the said Grigsby, Wright & Grigsby at different times appeared for the examination of witnesses as attorneys not only for the said James S. McClellan, but for all the other complainants herein, and that upon the trial of the said matter in the said circuit court before the said Chas. S. Whiting, as Judge of the said court in February, 1909, the said James S. McClellan was present as a witness and testified, and that the said James S. McClellan in said hearing stated under oath as a witness that in employing the said firm of Grigsby, Wright & Grigsby and in prosecuting his said petition and claim to the said estate he was in fact authorized to act for and did act for each and all of the complainants herein, and that prior to employing the said Grigsby, Wright & Grigsby he had communicated by mail with each of the said complainants and that they had authorized him to employ counsel and to prosecute their said claim to the said estate.

And this affiant further states that at the time of the hearing in the said county court within and for the said county of Minnehaha the said John C. McClellan and William S. McClellan were each present and testified as witnesses in support of the said petition of the said James S. McClellan for the revocation of the said letters of administration issued as aforesaid to the said William Van Eps, and that the said William S. McClellan was also present and testified as a witness in support of the said petition of the said James S. McClellan in the Circuit Court within and for the county of Minnehaha at the time of the first trial had before Joseph W. Jones, as Judge of the said county court, denying the petition of the said James S. McClellan for revocation of the said letters of administration issued to the said William Van Eps.

And this affiant further states that on or about the 25th day of August, 1908, there was filed in the county court within and for the said county of Minnehaha by Sioux K. Grigsby as attorney for the un-known, non-resident heirs and claimants of the said John McClellan deceased, a verified petition for the appointment of a special administrator on account of the death of the said William Van Eps while acting as administrator of the said estate, and a Notice of Motion for the appointment of such special administrator, a true and correct copy of which petition and notice of motion is hereto attached marked "Exhibit A," and is hereby referred to and made a part hereof, and that upon such petition and notice of motion such proceedings were had in the said county court, that shortly

thereafter the said George T. Blackman, the sole defendant herein was duly appointed upon the said petition of the said Sioux K. Grigsby as special administrator of the said estate, and qualified as such, and letters of special administration were so issued to him out of the said court, and he thereupon entered upon the discharge of his duties as such administrator, and is now acting as such, and that at all times since the appointment and qualification of the said George T. Blackman as such special administrator, the said Grigsby & Grigsby have been his attorneys and counsel in the matter of the discharge of his duties as such special administrator, and are now acting as such counsel and were acting as his counsel and attorneys at the time this suit was commenced, and that the answer of the said George T. Blackman in this suit as filed herein, to which reference is hereby made, sets out none of the substantial or material facts set forth in the petition filed herein by the state of South Dakota for leave to intervene in this suit, and that to permit this cause to proceed to a trial upon the bill of complaint of the said complainants herein and the answer of the said special administrator would result in a mere sham defence as this affiant is informed and verily believes, to the matters set forth in the bill of complaint herein.

And this affiant further states; that upon the trial of the said cause in the said Circuit Court within and for the said county of Minnehaha in the state of South Dakota, before the said Chas. S. Whiting as judge, commencing on or about the 11th day of February, 1908, a final judgment was entered in which it was adjudged and determined that the said James S. McClelland and his said co-complainants herein, are not the sons of or in any manner whatsoever related to the said John McClellan deceased, and that the said judgment has not been reversed or modified, but is in full force and effect, but that a proposed Bill of Exceptions has been prepared and served by said Grigsby & Grigsby as attorneys for the said James S. McClellan, and that amendments to the said proposed Bill of Exceptions have been prepared and served in behalf of the state of South Dakota and the said proposed Bill and amendments have been filed in the office of the said Clerk of the Circuit Court within and for the said county of Minnehaha, and that the said proposed Bill of Exceptions and proposed amendments thereto were prepared and served in time to have permitted the said James S. McClellan to have procured a settlement of the said Bill of Exceptions and to have brought on a motion for a new trial of the said matter in the said Circuit Court, and to have perfected an appeal in case of the overruling of their motion for a new trial, to the Supreme Court of the state of South Dakota, and to have had the said cause submitted to the regular April, 1909 term of the said Supreme Court of the state of South Dakota, the said Attorney General and the State's Attorney having consented in writing in the said cause in the said Circuit Court to waive all questions of time and to have the said cause placed upon the April, 1909 term of the said Supreme Court.

Wherefore the said state of South Dakota prays the order of this court denying in all things the application contained in behalf of the said complainants herein in the affidavit of the said Melvin

Grigsby, and in the said Order to show cause, and for such other and further order in the premises as may be just and equitable.

U. S. G. CHERRY.

Subscribed and sworn to before me this 14th day of April, A. D. 1909.

[NOTARIAL SEAL.] JOHN BARTON,
Notary Public.

EXHIBIT "A."

In County Court.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In the Matter of the Estate of John McClellan, Deceased.

Notice of Motion.

To Alpha F. Orr, States Attorney in and for the County of Minnehaha, State of South Dakota, and to James S. McClelland, Petitioner:

You will please take notice: That on the 25th day of August, A. D. 1906, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the undersigned will, upon the petition hereto annexed, a true copy of which is herewith served upon you, move the court for an order appointing George T. Blackman of Sioux Falls, South Dakota, as special administrator of the above estate upon the giving and filing of a bond as required by law.

Dated this 24th day of August, A. D. 1906.

SIOUX K. GRIGSBY,
Attorney for the Unknown Non-Resident Heirs and Claimants of the Estate of John McClellan, Deceased.

In County Court.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In the Matter of the Estate of John McClellan, Deceased.

Petition for Appointment of Special Administrator.

To the Honorable Dana R. Bailey, Judge of the County Court in and for the County of Minnehaha, State of South Dakota:

The petition of Sioux K. Grigsby, of the city of Sioux Falls, Minnehaha County, South Dakota, respectfully represents:

That John McClellan, whose true name was John McClelland, died on or about the 31st day of August, 1899, in the city of Sioux Falls, County of Minnehaha, State of South Dakota, and that said

deceased left an estate in the aforesaid county and state consisting of real and personal property; that the value and character of said property, so far as is known to your petitioner, is as follows, to-wit: that said real property consists largely of lots in said city of Sioux Falls, upon some of which improvements are situated, and certain shares, interests and rights in several lots in said city and other lands and premises in the aforesaid county of Minnehaha, as to the exact value of which your petitioner is unable to estimate; that said personal property consists largely of notes, mortgages, due-bills, accounts, certificates of deposit and other deposits of money in banks and other personal effects and bills in said city of Sioux Falls.

That the personal estate and effects of, for and in respect to which letters of special administration are hereby applied for, as your petitioner is informed and believes, does not exceed in value thirty thousand dollars ($30,000), and the rents, issues and profits of the real property do not exceed, as your petitioner is informed and believes, the sum of one thousand dollars ($1000) per annum.

That due search and inquiry have been made to ascertain if said deceased left any will and testament but that none has been found and your petitioner alleges upon his best knowledge, information and belief that said deceased died intestate.

That subsequent to the death of said John McClellan certain petitions praying for the issuance of letters of administration were filed with this Honorable Court as follows, to-wit: by Edward J. Tabor for his own appointment; by the State Banking & Trust Company, a corporation, for the appointment of Edward J. Tabor; by John Powers and J. C. Carpenter for the appointment of William Van Eps; by C. V. Booth for the appointment of William Van Eps; by Moriz Levinger, W. R. Todd and Moses Kaufmann for the appointment of Frank Forde; by John Barnes for the appointment of William Van Eps; by Margaret Carruthers for the appointment of Cyrus Walts; by Mary A. Vine for the appointment of Cyrus Walts; by Margaret Hammill and Mary McClelland for the appointment of Henry Atkinson, and by Hosmer H. Keith for the appointment of himself.

That thereafter on the 9th day of August 1899, the said County Court deeming it necessary and advisable that an attorney be appointed to represent and care for the interests of such unknown non-resident heirs and other parties not before the court and to protect such rights or interests of said unknown non-resident heirs as might thereafter be determined upon, did make and enter its order appointing your petitioner, Sioux K. Grigsby, as the attorney for all such unknown non-resident heirs or claimants and that your said petitioner did thereupon enter upon his duties as said attorney and is now the duly appointed attorney for all such unknown non-resident heirs or claimants.

That thereafter and upon due notice and the hearing in open court of the petitions aforesaid, this Court did on the 8th day of February, 1900, decree that letters of administration issue to the said William Van Eps and in accordance therewith this Court, by the Honorable William A. Wilkes, Judge thereof, issued and filed on the said 8th day of February, 1900, letters of administration

herein to the said William Van Eps, and that thereupon the said administrator filed his bond as required by statute and qualified and entered upon the administration of said estate.

That from said order appointing said William Van Eps as administrator of said estate, said petitioners Edward J. Tabor, The State Banking & Trust Company, Mary A. Vine and Hosmer H. Keith perfected their separate appeals to the circuit court in and for said Minnehaha County, South Dakota.

That thereafter on the 24th day of February, 1900, the petition of James S. McClelland alleging himself to be a son of the deceased was filed with said Court praying that letters of administration be issued to himself and one Edmund C. Hinde, and which petition contested all other petitions then before the court.

That the petition of the said James S. McClelland came on for hearing before the Court after due notice to all of the parties interested therein, and that said petition was thereafter denied by said court, from which order denying the same the said petitioner perfected his appeal to said Circuit Court of Minnehaha County.

That said appeals coming on for hearing before the Circuit Court of Minnehaha County at the April 1900 term of said Court, before a jury duly empaneled, such proceedings were then and there had as resulted in findings of fact and conclusions of law by the said court to the effect that said Mary A. Vine was entitled to letters of administration of the estate of the said deceased, and that the order of the County Court appointing said William Van Eps as such administrator be reversed accordingly.

That no evidence was offered at said trial in the circuit court for or in behalf of said Edward J. Tabor or the said State Banking & Trust Company and that the said Edward J. Tabor and the said State Banking & Trust Company were in default upon said appeals.

That thereafter such proceedings were had for and in behalf of the said petitioners Mary McClelland, Margaret Hammill, James S. McClelland and Hosmer H. Keith whereby said findings of fact and conclusions of law were vacated and set aside by the circuit court of Minnehaha County and a new trial of the said matter was granted by the said circuit court, which new trial came on for hearing before Honorable A. W. Campbell, Judge presiding at the April term of said court, in the city of Sioux Falls, on the 11th day of June, A. D. 1901, whereupon the petitioners Mary A. Vine, Mary McClelland, Margaret Hammill and James S. McClelland appeared and offered evidence in support of their petitions and the said Hosmer H. Keith having failed to appear or offer evidence in support of his said petition, was adjudged in default on his said appeal.

That the said Edward J. Tabor, State Banking & Trust Company and Hosmer H. Keith ever since have been and now are in default upon their petitions for letters of administration herein and have waived any rights to the administration of said estate.

That on the 5th day of September, 1909, said circuit court of Minnehaha County made, filed and entered findings of fact and conclusions of law upon the trial of said hearing aforesaid, vacating and setting aside the appointment of William Van Eps as administrator

and denying the petitions of said James S. McClelland and Mary A. Vine, and ordering that some suitable person be by the county court of Minnehaha County appointed as administrator of said estate.

That the motion for a new trial of said matter on the part of Mary A. Vine, James S. McClelland, Mary McClelland and Margaret Hammill thereafter coming on before the court for hearing, the same was denied by the Circuit Court of Minnehaha County and from the order denying the same the said Mary A. Vine and James S. McClelland perfected an appeal to the Supreme Court of the State of South Dakota, which appeal coming on for hearing before said court at the October, 1902, term of said court, the court did on the 3rd day of April, 1906, make, file and enter its judgment confirming the order of the Circuit Court of Minnehaha County denying a new trial to the petitioners Mary A. Vine and James S. McClelland, upon which said judgment no further proceedings were taken by the said Mary A. Vine, but that within the time required by law the said James S. McClelland did perfect his petition for a rehearing of his said appeal, which said petition for rehearing was granted by the Supreme Court of the State of South Dakota on the 8th day of August, 1906, and that a rehearing of the appeal of the said James S. McClelland will be argued at the October, 1906, term of said Supreme Court.

That the said Mary A. Vine, Mary McClelland and Margaret Hammill are now in default upon their said petitions and have waived any rights to the administration of said estate.

That no judgment has been entered upon the order of the Circuit Court of Minnehaha County removing said William Van Eps as administrator of said estate but that the said William Van Eps did continue as such administrator and continued to hold the custody and possession of the said estate until on or about the 12th day of July, 1906, when the said William Van Eps departed this life, since which time said estate has been without an administrator.

That as your petitioner is informed and believes, there are at this time no creditors of the said estate and no claimants thereof, or of any part thereof, except the said James S. McClelland and his brothers and nephews as set out in his original petition filed in this court, and that there are not parties in any manner interested in the said estate excepting the said James S. McClelland and his relatives aforesaid and the State of South Dakota, in so far as the said State of South Dakota may have an interest in the proper and lawful distribution thereof.

That whatever rights any unknown non-resident heirs or claimants may have or have had have been amply and fully protected by your petitioner during the progress of the litigation concerning said estate.

That the said estate consists largely of real property upon which your petitioner is informed and believes there are taxes due and unpaid, rents to be collected and improvements to be cared for and due-bills or promissory notes to be compromised or collected and the proceeds thereof preserved for the benefit of the persons hereafter adjudged to be lawfully entitled thereto.

That it appears to petitioner to be for the best interests of the estate that a special administrator be appointed as provided by law, and that your petitioner verily believes that George T. Blackman of the city of Sioux Falls, County of Minnehaha, State of South Dakota, is well qualified and is competent under the law for special administrator of said estate.

Wherefore, Your petitioner prays this Honorable Court that its order be made, filed and entered upon the minutes thereof appointing the said George T. Blackman of Sioux Falls, as special administrator of the estate of John McClellan, deceased; that the amount of his bond as such special administrator be fixed by the Court and that after such bond has been filed that letters of special administration shall issue to the said George T. Blackman in conformity with the order and in compliance with the statutes in such cases made and provided.

Dated at Sioux Falls, South Dakota, this 24th day of August, A. D. 1906.

SIOUX K. GRIGSBY,
Attorney for the Unknown and Non-resident Heirs and Claimants of the Estate of John McClellan, Deceased.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Personally appeared Sioux K. Grigsby, who being first duly sworn deposes and says that he is attorney for all the unknown and non-resident heirs and claimants of the estate of John McClellan, deceased; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief and as to those matters he believes it to be true.

SIOUX K. GRIGSBY.

Subscribed and sworn to before me this 24th day of August, A. D. 1906.

[SEAL.]

J. M. JOHNSON,
Notary Public, South Dakota.

EXHIBIT "B."

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In Circuit Court, Second Judicial Circuit.

In the Matter of the Estate of JOHN MCCLELLAN, Deceased.

Order Granting Leave to the State of South Dakota to Intervene.

Upon all the files, pleadings and proceedings hereinbefore had and upon the verified information and petition of Alpha F. Orr, as State's Attorney for the State of South Dakota, within and for the County of Minnehaha and said State and upon the notice of motion dated February 3rd, 1908 and duly served upon the petitioner, James S. McClellan, and returnable herein on the 11th day of February, 1908, it is hereby ordered that the State of South Dakota and the said State's Attorney be granted leave to file herein the information and petition verified by the said Alpha F. Orr as said State's Attorney under date of February 3rd, 1908 and described and referred to in the said notice of motion and to appear and intervene herein and to produce evidence in support of the matters and allegations set forth in the said information and petition and in opposition to the said petition of the said James S. McClellan and to contest the said petition of the said James S. McClelland and that S. W. Clark, the Attorney General of the said State of South Dakota, together with U. S. G. Cherry, as Special Counsel for the said state of South Dakota be permitted to appear herein in behalf of the said State of South Dakota, together with the said State's Attorney for the said State in support of the allegations of the said information and petition and in opposition to the said petition of the said James S. McClellan;

And it appearing that the above and foregoing formal order of the Court was, through inadvertance and over-sight not filed and entered on the 11th day of February, 1908, the date the same was orally made and pronounced by the court, it is hereby further ordered that the same be filed and entered with the same force and effect as if the same had been filed and entered on the said 11th day of February, 1908.

Appearance on behalf of the State, S. W. Clark, Attorney General.

Appearance on behalf of the claimant, Grigsby & Grigsby.

Done this 10th day of Nov. 1908.
By the Court,

CHAS. S. WHITING, *Judge.*

Attest:
[SEAL.] E. D. ALDRICH, *Clerk.*

(Endorsed:) #538 So. Div.—John C. McClellan et als. vs. George T. Blackman Special Administrator of Estate of John McClellan, Deceased—Affidavit of U. S. G. Cherry—Filed April 14, 1909, Oliver S. Pendar, Clerk.

And afterwards, to-wit, on the 15th day of April, A. D. 1909, there was filed in the office of the Clerk of said Court, Order Denying Application contained in Order to Show Cause; which said Order is in words and figures the following, to-wit:

Order.

In the Circuit Court of the United States, for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

The order to show cause, returnable on the 12th day of April, 1909, and adjourned by consent to the date hereof, why the orders made by this court staying proceedings herein, dated respectively January 4th, 1909, and March 18th, 1909, should not be vacated and set aside, and why this suit should not proceed immediately to a speedy hearing and determination of the same, coming on regularly for hearing at the court room in the Federal Building in the city of Sioux Falls, in the said district, Grigsby & Grigsby appearing in support of the same and S. W. Clark, George J. Danforth and U. S. G. Cherry appearing in opposition thereto, and the court having heard the arguments of counsel and being fully advised in the premises, and having fully considered the matter, it is hereby ordered:

That the application contained in the said Order to show cause be and the same hereby is in all things overruled and denied.

Dated at Sioux Falls, South Dakota, this 14th day of April, 1909.

By the Court:

JOHN E. CARLAND, *Judge.*

Attest:

[SEAL OF COURT.] OLIVER S. PENDAR, *Clerk.*

(Endorsed:) No. 538 S. D.—Circuit Court of the United States, District of South Dakota, Southern Division—John C. McClellan, et al. vs. George T. Blackman, Special Administrator of the estate of John McClellan, Deceased—Order denying Application contained in Order to Show Cause—Filed April 15, 1909, Oliver S. Pendar, Clerk.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Oliver S. Pendar, Clerk of the Circuit Court of the United States of America, for the District of South Dakota, do hereby certify that the foregoing is a true and complete transcript of all of the record and files, with the exception of the Obligation for Costs, filed and entered of record in the cause of John McClellan, James S. McClellan, William S. McClellan, Walter McClellan and Edmund McClellan, Complainants, vs. George T. Blackman, Special Administrator of the estate of John McClellan, Deceased, Defendant, as fully as the same appear from the original records and files of this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District, this 16th day of December, A. D. 1909.

[Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.]

OLIVER S. PENDAR, *Clerk.*

McCLELLAN *v.* CARLAND, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 630. Argued January 25, 26, 1910.—Decided April 11, 1910.

The power of this court to issue writs of certiorari to the Circuit Court of Appeals is not limited to the provisions of the Court of Appeals Act. It may issue them under § 716, Rev. Stat. *In re Chetwood*, 165 U. S. 443; *Whitney* v. *Dick*, 202 U. S. 132.

Under § 716, Rev. Stat., and § 12 of the Court of Appeals Act the Circuit Court of Appeals has authority to issue writs of *scire facias* and all writs not specifically provided for by statute and necessary for the exercise of the court's jurisdiction, and agreeable to the usages and principles of law.

Where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below; and so held that the Circuit Court of Appeals may issue mandamus to compel the Circuit Court to vacate a stay pending proceedings in the state court to determine and thus render *res judicata* questions within the jurisdiction of the Circuit Court, and involved in the action in which the stay was granted.

The constitutional grant of chancery jurisdiction to Federal Courts in cases where diverse citizenship exists, to determine interests in estates, is the same as that possessed by the Chancery Courts of England and it cannot be impaired by subsequent state legislation creating courts of probate. *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33.

A Federal court cannot abandon its jurisdiction already properly obtained of a suit and turn the matter over for adjudication to the state court. *Chicot County* v. *Sherwood*, 148 U. S. 529.

The pendency of a suit in the state court is no bar to proceedings concerning the same matter in a Federal court having jurisdiction thereover.

The judgment in a suit between claimants of an estate and the administrator does not conclude the rights of the State claiming an escheat so long as it is not a party and has not been allowed to intervene on its own behalf.

On certiorari this court will consider only the record in the Circuit Court of Appeals as certified here in return to the writ, and it decides the case solely as presented in such return.

In this case *held* that the Circuit Court of Appeals should have issued an alternative writ of mandamus to, or order to show cause why, the Circuit Judge should not vacate a stay in an action brought against an administrator by one claiming to be an heir while and until proceedings brought by the State for escheat in the state court should be finally determined.

THE facts are stated in the opinion.

Mr. Melvin Grigsby for petitioners:

The Circuit Court cannot rightfully stay proceedings of an action there pending to await the commencement and determination of another action in a state court. *Barber Asphalt Co.* v. *Judge Morris*, 132 Fed. Rep. 945, citing *In-*

surance Co. v. *Harris*, 97 U. S. 331, 336; and see *Harkrader* v. *Wadly*, 172 U. S. 150; *Smyth* v. *Ames*, 169 U. S. 466; *Lang* v. *Choctaw & Gulf R. R. Co.*, 160 Fed. Rep. 359; *Sullivan* v. *Algrem*, 160 Fed. Rep. 366; *Gordon* v. *Logest*, 16 Pet. 97; *In re Langford*, 57 Fed. Rep. 570.

The writ of mandamus from the Circuit Court of Appeals was the proper and only available remedy for the correction of the error made by the Circuit Court in staying proceedings in that court. *Barber Asphalt Paving Company* v. *Morris*, *supra*.

The Circuit Court could not properly stay proceedings on the ground that it was necessary for the protection of the State of South Dakota, the State having appeared in that court claiming to be an interested party.

The opinion below is based on the theory that the Circuit Court could not proceed without making the State a party, and that to make the State a party would oust the jurisdiction of the court under the Eleventh Amendment, and that *Minnesota* v. *The Northern Securities Co.*, 184 U. S. 200; *California* v. *Southern Pacific Company*, 157 U. S. 229, controlled, relying on cases cited. *Shields* v. *Barrow*, 17 How. 130; *Hipp* v. *Babin*, 19 How. 271, 278; *Parker* v. *Winnipiseogee Woolen Co.*, 2 Black, 545; but in these cases this court held that the complaints disclosed that the relief could not be granted as prayed for without affecting the rights of others not parties to the suits.

In the case at bar it does not appear that the State or any party, except only the petitioners and the defendant, had any interest whatever in the subject-matter of the suit, unless it can be claimed that in every case wherein heirs seek to establish title to the property of a decedent the State is a necessary party, and can claim the right of intervention on the ground that the property of all decedents escheats to the State in default of legitimate heirs.

The State of South Dakota petitioned the Circuit Court for leave to intervene, claiming to be the owner of the prop-

erty in question, because the same had escheated to the State, making a case almost exactly in line with *United States* v. *Judge Peters*, 5 Cranch, 115; and see *South Carolina* v. *Wesley*, 155 U. S. 543, almost identical in principle with the case here presented, and in which, although it appeared that the property was in possession of and belonged to the State, the Circuit Court overruled the motion to dismiss, and was sustained by this court, citing *United States* v. *Peters*, 5 Cranch, 115, *supra; The Exchange* v. *McFadden*, 7 Cranch, 116; *Osborn* v. *Bank*, 9 Wheat. 738; *United States* v. *Lee*, 106 U. S. 196; *Stanley* v. *Schwalby*, 147 U. S. 508; see also *Tindal* v. *Wesley*, 167 U. S. 203, 206.

The same doctrine was laid down in *United States* v. *Lee*, 106 U. S. 196, 251; *Carr* v. *United States*, 98 U. S. 433; in which it was held that judgment against a defendant who claimed title under the United States could be set up by way of estoppel in an action brought by the United States to quiet title to the same land, was no estoppel, even though in the former action the United States district attorney for the district, and other counsel employed by the Secretary of the Treasury, attended at the trial on behalf of the defendant.

The Circuit Court had jurisdiction of the suit of *John McClellan* v. *Blackman*, as administrator; *Payne* v. *Hook*, 7 Wall. 425; *Byers* v. *McAuley*, 149 U. S. 608, 867; *Ingersoll* v. *Coram*, 211 U. S. 335.

The petitioners will be deprived of their rights under Art. III, § 2 of the Constitution of the United States unless the order of the Circuit Court of Appeals shall by this honorable court be reversed.

Mr. Frederic D. McKenney, with whom *Mr. S. W. Clark*, Attorney General of South Dakota, and *U. S. G. Cherry* were on the brief, presented a statement and suggestions on behalf of John E. Carland, United States District Judge for the District of South Dakota:

The statutory writ of certiorari under the provisions of

the act of March 3, 1891, is not available, nor is § 716, Rev. Stat.

The writ of mandamus in the Federal courts is never an independent suit, as it is in many States and in England. The courts of the United States have no power to acquire jurisdiction of a case or question by issuing a writ of mandamus. Their authority in this regard is limited to the issuance of writs of mandamus in aid of their appellate jurisdiction and in such cases as are already pending and wherein jurisdiction has been obtained on other grounds and by other process. *McClung* v. *Silliman*, 6 Wheat. 601; *McIntire* v. *Wood*, 7 Cr. 504; *Kendall* v. *United States*, 12 Pet. 524; *Riggs* v. *Johnson County*, 6 Wall. 166, 197, 198; *Secretary* v. *McGarrahan*, 9 Wall. 311; *Bath County* v. *Amy*, 13 Wall. 244; *Graham* v. *Norton*, 15 Wall. 427; *Greene County* v. *Daniel*, 102 U. S. 187; *Davenport* v. *Dodge County*, 105 U. S. 237; *Smith* v. *Bourbon County*, 127 U. S. 105; *United States* v. *Williams*, 67 Fed. Rep. 384; *United States* v. *Judges*, 85 Fed. Rep. 179; *In re Forsyth*, 78 Fed. Rep. 301; *Waite* v. *Santa Cruz*, 89 Fed. Rep. 619; *Shepard* v. *Irrigation Dist.*, 94 Fed. Rep. 3; *Rosenbaum* v. *Supervisors*, 28 Fed. Rep. 223.

If the Circuit Courts of Appeals have the power to issue writs of mandamus at all, that power is derived from the provisions of § 716, Rev. Stat., as read into the Circuit Court of Appeals Act by § 12, such writ can issue only in aid of their appellate jurisdiction, and in the exercise of their discretionary authority. *Barber Asphalt Paving Co.* v. *Morris*, 132 Fed. Rep. 945; *In re Pacquet*, 114 Fed. Rep. 437; *Travers Co.* v. *Bridge Co.*, 92 Fed. Rep. 690; *United States* v. *Severens*, 71 Fed. Rep. 768.

But if the case here should be retained on the writ of certiorari under § 6 of the act of 1891, no order purporting to direct or control the conduct of District Judge Carland in the future course of the cause could well be issued without said District Judge first being accorded an opportunity to show cause in the premises.

The record shows that petitioners invoked the jurisdiction of the proper state courts to determine the very matter, namely, the question of his and their relationship to John McClellan, deceased. Under § 80, Probate Code of South Dakota, "administration of the estate of a person dying intestate must be granted to some one or more of the persons herein mentioned."

The refusal of the county court to appoint any of the petitioners administrator carries with it, at least by necessary implication, the finding that none of said petitioners was either the son or grandson of the intestate as alleged.

Where the order or judgment of a state court in proceedings for administration depends upon the question as to whether the party claiming the right to administer such estate is next of kin or heir at law of the intestate, such order or judgment is conclusive upon that question until vacated or reversed in any and all subsequent suits or proceedings, whether in the state or Federal courts. Such order or judgment until vacated or reversed is pleadable in bar and as *res adjudicata* in such subsequent proceedings. *Caujolle* v. *Curtis*, 13 Wall. 465; *Howell* v. *Budd*, 91 California, 342.

Under § 5651, Laws of South Dakota, being § 26, Probate Code, the county court, when acting as a probate court and in respect to probate matters, is a court of general jurisdiction. *Matson* v. *Swenson*, 5 So. Dak. 191; and see Woerner on Administration, 2d. ed., 1234. Matters of administration affecting decedents' estates in the courts of South Dakota are proceedings *in rem*. *Byers* v. *McAuley*, 149 U. S. 608; *O'Callaghan* v. *O'Brien*, 199 U. S. 89; *Hook* v. *Payne*, 14 Wall. 253.

In South Dakota no right of action exists in favor of an heir, devisee or legatee to recover his portion or share of an estate, against an administrator, independent of a proceeding either direct or ancillary in probate. A suit *inter partes* between the administrator and the heir, devisee or legatee is not provided for. Final distribution must be made in the

probate court before the person entitled to the estate can recover it.

In South Dakota the order or decree of the probate court must name the persons and the proportions or parts to which each is entitled before any right of action accrues in favor of any person to recover from an administrator. The final order and decree is conclusive and can only be reversed, set aside, or modified on an appeal. *Carrau* v. *O'Calligan*, 125 Fed. Rep. 657; *Richardson* v. *Green*, 61 Fed. Rep. 423; *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33.

The application of the State to intervene in the Federal court was proper. *Gumbel* v. *Pitkin*, 124 U. S. 143; *Krippendorf* v. *Hyde*, 110 U. S. 276, 283; *State of Florida* v. *Georgia*, 17 How. 478; *Paradise* v. *Farmers' & Mechanics' Bank*, 5 La. Ann. 710.

The bill of complainant as drawn, considered in the light of the scope of its prayers, is clearly beyond the jurisdictional powers of the Circuit Court. *Waterman* v. *Canal-Louisiana &c.*, 215 U. S. 33.

In either event, and as well for the want of an indispensable party—the State of South Dakota, as above noted—the Circuit Court of the United States for the District of South Dakota is without jurisdiction to proceed with the cause otherwise than by dismissing the bill of complaint for want of jurisdiction.

MR. JUSTICE DAY delivered the opinion of the court.

This case comes here upon a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. In that court McClellan and others, petitioners, filed a petition for a writ of mandamus against the United States District Judge for the District of South Dakota, praying a writ of mandamus to said judge, sitting as a judge of the Circuit Court of said district, commanding him to set aside and vacate certain orders staying proceedings in an action pending in the Cir-

cuit Court, and to proceed to try and determine the suit in the usual course of procedure, without regard to the pendency of certain proceedings, to be hereinafter referred to, in the courts of the State of South Dakota. The Circuit Court of Appeals upon the petition for a writ of mandamus being presented to it denied the prayer thereof and dismissed it. Thereafter this court granted the writ of certiorari.

From the transcript of the record of the case in the Circuit Court of Appeals it appears that petitioner and others, on the eighth day of September, 1908, commenced suit against George T. Blackman, special administrator of the estate of John C. McClellan, deceased, and others, in the Circuit Court of the United States for the District of South Dakota, in which suit complainants were citizens of States other than South Dakota, and respondent, George T. Blackman, a citizen of South Dakota, was sued as special administrator of the estate of John C. McClellan, deceased. The bill set up that complainants were the sole surviving heirs at law and next of kin of John C. McClellan, deceased, who died on or about the thirty-first of August, 1899, intestate, in the city of Sioux Falls, county of Minnehaha, South Dakota, leaving an estate of real and personal property of the value of about $33,000. The bill sets out the issuing of letters of administration to one William Van Eps, who held possession of the estate until July 12, 1906, when he died; that subsequently thereto special letters of administration were issued to George T. Blackman, the respondent. The bill further avers that there was in possession of said Blackman, as said special administrator, belonging to said estate, assets in excess of the sum of $35,000, consisting of real estate, cash on hand, etc. The bill avers that there were no claims against the estate, and that all the creditors of John C. McClellan had been paid, and that the estate was ready for distribution according to the laws of South Dakota. The bill further prayed that the complainants might be adjudicated the sole heirs at law and next of kin of said decedent, and entitled to

inherit the estate, real and personal, and that the said Blackman render a just and true account of the property in his hands belonging to said estate, and, after deducting his lawful fees and expenses, be required to distribute the same in certain proportions to the complainants, as heirs at law of the decedent. The defendant Blackman appeared and answered the bill, admitting certain allegations thereof, and denying others, and demanding proof thereof, and stating that he held the property described in the bill of complaint subject to the order of the court. A general replication was filed to the answer, and thereupon it appears that the State of South Dakota came, by its attorney general and its attorney for the county of Minnehaha, and special counsel, and asked leave to intervene in the case, and, upon hearing, the Circuit Court of the United States overruled the motion, and ordered that the further prosecution of the action then pending before it be stayed for the period of ninety days, for the purpose of allowing the State of South Dakota to commence a proper action or proceeding to establish its title and interest in and to the property in the estate of the decedent, and that in the event that such action be commenced within that time, then the pending action to be stayed until the determination of such action brought by the State of South Dakota. Afterwards the complainants filed an application for the vacation of the orders staying the prosecution of their suit until the determination of the suit in the state court, but the same was denied, and thereafter the petition for mandamus in the Circuit Court of Appeals was filed, with the result already stated.

The matters we have stated constitute the entire record before the Circuit Court of Appeals. Upon that record it appears that the Circuit Court of the United States having an action before it to determine the interest of the complainants in the estate of John C. McClellan, upon which issue had been joined, upon application of the State of South Dakota refused to permit it to intervene in the case to set

up its right and title to the property in the estate of the decedent, upon the claim that he died without legal heirs, and stayed the proceedings in the case before it until the State of South Dakota could bring an action in the state court for the purpose of determining such rights; and afterwards, it appearing that the State had commenced such action against all persons having or claiming a right, title, or interest therein, stayed the pending action until the determination of the action in the state court.

It is first objected on behalf of the respondent herein that this is not a case in which this court has the authority to issue the writ of certiorari. It is contended that the application for the writ in this case was under the act of March 3, 1891 c. 517, 26 Stat. 826, and that the right to grant writs of certiorari to the Circuit Court of Appeals is limited by the act to certain cases made final in the Circuit Court of Appeals, and that by § 10 of the Court of Appeals Act it is declared that whenever on appeal, writ of error, or otherwise, a case coming from the Circuit Court of Appeals shall be reviewed and determined in the Supreme Court, it shall be remanded to the proper District or Circuit Court for further proceedings in pursuance of such determination.

These provisions, it is contended, show that a writ of certiorari is not warranted in this case, it being an original application in mandamus in the Court of Appeals, and the jurisdiction in the Circuit Court not depending upon the opposite parties to the suit being citizens of different States, and, therefore, the judgment not final in the Circuit Court of Appeals, nor could the case be remanded to the proper District or Circuit Court, as it was an original proceeding in mandamus in the Circuit Court of Appeals. But the power of this court to issue writs of certiorari is not limited to the Court of Appeals Act. Section 716 of the Revised Statutes of the United States provides:

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall

also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Of this section it was said in *In re Chetwood*, 165 U. S. 443, 461:

"By section 14 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 81, carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *Amer. Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 380. And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, c. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. 398; Bacon's Abr. Certiorari."

In *Whitney* v. *Dick*, 202 U. S. 132, a writ of certiorari was granted to the Circuit Court of Appeals for the Ninth Circuit to review the judgment of that court where an original application had been made for the writ of *habeas corpus* and a writ of certiorari in that court. This court held, upon the question of jurisdiction, that there could be no appeal from the Circuit Court of Appeals in such a case, but that a writ of certiorari might issue to bring the case here from the Circuit Court of Appeals upon the authority of *In re Chetwood*, 165 U. S. *supra*. The case at bar being a petition for mandamus there is no amount in controversy, and, consequently, there could be no appeal to this court; and, as in *Whitney* v. *Dick*, *supra*, the judgment of the Circuit Court of Appeals was not final because

of the diversity of citizenship in the court below, and, consequently, certiorari would not issue under the act of 1891. In *Whitney* v. *Dick* the case was remanded to the Circuit Court of Appeals, with instructions to quash the writ of certiorari issued by that court and to dismiss the petition for *habeas corpus*.

In the present case we have no doubt of the authority of this court to issue the writ of certiorari under § 716 of the Revised Statutes of the United States as construed and applied in the cases just cited—*In re Chetwood*, 165 U. S., and *Whitney* v. *Dick*, 202 U. S. *supra*. The suggestion, therefore, that this case should be dismissed for want of power in this court to grant the writ of certiorari cannot be entertained. While the power to grant this writ will be sparingly used, as has been frequently declared by this court, we should be slow to reach a conclusion which would deprive the court of the power to issue the writ in proper cases to review the action of the Federal courts inferior in jurisdiction to this court.

It is further objected that the Circuit Court of Appeals had no jurisdiction to issue the writ of mandamus, as that writ can only be issued in aid of the appellate jurisdiction of the Circuit Court of Appeals, and, it is contended, as that court had no jurisdiction of the suit when the application for mandamus was filed, it ought to have been dismissed. Section 12 of the Court of Appeals Act declares that the Circuit Court of Appeals shall have the powers specified in § 716 of the Revised Statutes of the United States. That section we have already had occasion to quote, and when read in connection with § 12 of the Court of Appeals Act it gives to the Circuit Court of Appeals the authority, as this court has, to issue writs of *scire facias*, and all writs not specifically provided for by statute, and necessary for the exercise of the court's jurisdiction, and agreeable to the usages and principles of law.

In this case it appears that the original action commenced in the Circuit Court of the United States might have been taken on appeal to the Circuit Court of Appeals. The suit involved over $2,000 in amount and was between citizens of

different States. There are not wanting decisions in the Federal courts holding different views as to the right to issue such writs as are involved in this case, before the appellate court has actually obtained jurisdiction of the case. There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below. This rule was distinctly stated and the previous cases referred to in *Insurance Company* v. *Comstock*, 16 Wall. 258, 270. In that case the rule was recognized that this court had the power to issue the writ of mandamus to compel the Circuit Courts to proceed to final judgment in order that this court may exercise the jurisdiction of review given by law. In that case the court said:

"Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause."

In *Ex parte Bradstreet*, 7 Pet. 634, the same rule was laid down by Chief Justice Marshall, speaking for the court, requiring a Federal court of inferior jurisdiction to reinstate a case, and to proceed to try and adjudicate the same. And see *In re Pennsylvania Co.*, 137 U. S. 451, 452; *Virginia* v. *Rives*, 100 U. S. 313; *United States, Petitioner*, 194 U. S. 194; *Barber Asphalt Co.* v. *Morris*, 132 Fed. Rep. 945.

Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the state court might prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals, which had jurisdiction for that purpose, we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it.

The question then arises, was the Circuit Court justified in staying the proceedings in the case, and withholding further action until the case involving the same question might be brought and determined in the state court? We think that there can be but one answer to this question. The case made upon the bill was within the original jurisdiction of the Circuit Court of the United States. The right of the Circuit Court to maintain such actions, notwithstanding the legislation of the State creating probate courts, has been so recently before this court as to require no further consideration now. *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33. In that case, following previous decisions of this court, it was held that the chancery jurisdiction of the Federal courts to entertain suits between citizens of different States to determine interests in estates, and to have the same fixed and declared, having existed from the beginning of the Federal government, and created by the grant of equity jurisdiction to such courts as it existed in the chancery courts of England, could not be impaired by subsequent state legislation creating courts of probate. The action was therefore within the jurisdiction of the Circuit Court of the United States.

So far as the record presented to the Circuit Court of Appeals shows, the only ground upon which the Circuit Court acted in postponing the suit was because the State of South Dakota, which had applied to be made a party, and which application was denied, was about to begin a suit in the state court to determine an escheat of the estate of John C. McClellan, therefore the action was stayed, first, until the beginning of such suit, and then until it was determined. It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. *Chicot County* v. *Sherwood*, 148 U. S. 529, 534.

It cannot be denied that a Circuit Court of the United

States, like other courts, had power to postpone the trial of cases for good reasons, but by the orders made in this case the Federal court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be *res judicata*, and thus prevent further proceedings in the Federal court.

The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different States the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case. In the present case, so far as the record before the Circuit Court of Appeals discloses, the Circuit Court of the United States had acquired jurisdiction, the issues were made up, and when the State intervened the Federal court practically turned the case over for determination to the state court. We think it had no authority to do this, and that the Circuit Court of Appeals, upon the record before it, should have issued the writ of mandamus to require the judge of the Circuit Court of the United States to show cause why he did not proceed to hear and determine the case.

Whether the State ought to have been allowed to intervene in the Federal court is not a question now before us; but, if not made a party to the suit, its rights would not have been concluded by any adjudication made therein. *Tindal* v. *Wesley*, 167 U. S. 204, 223.

We have thus far considered the case upon the record made in the Circuit Court of Appeals and certified here upon the writ of certiorari. In this court the honorable judge of the District Court entered special appearance, and filed an affidavit as to the proceedings before him, in which much appears which is not in the record presented to the Circuit Court of Appeals. In that appearance and affidavit the petition in intervention

filed in the Circuit Court of the United States is set forth in full, as well as certain affidavits which were filed. We shall not enter upon a consideration of these papers, because they are not in the record, as the same has been certified to us from the Circuit Court of Appeals as the one upon which it acted, and declined to issue the writ of mandamus. They set forth at length certain proceedings in the state courts of South Dakota, in which it is alleged that the issue of the right of the complainants in the equity suit to take the estate of John C. McClellan, as his heirs at law, was determined adversely to them, and that such proceedings were had as showed that further proceedings in reference to the escheat of the estate of McClellan for want of legal heirs ought to be determined by proceedings in the state court. In making his appearance in this court, and in presenting these papers, it is evident that the District Judge was much influenced in ordering the stay of proceedings, and withholding judgment until the state court had rendered its judgment, by the proceedings already had in the state courts of South Dakota.

As we have said, we do not pass upon the sufficiency of those proceedings to authorize the orders in question. We must take the case as it is presented here upon the stipulated return to the writ of certiorari on the record as presented to the Circuit Court of Appeals. Upon that record, we think, the Circuit Court of Appeals should not have dismissed the writ of mandamus, but should have ordered the alternative writ, or an order to show cause, to issue, in order that the District Judge might have been fully heard before the question was determined as to whether mandamus should issue or not.

We shall, therefore, reverse the judgment of the Circuit Court of Appeals and remand the case to that court, with directions to issue the alternative writ, or an order to show cause. All we decide is that upon the petition and record made in the Circuit Court of Appeals and as now presented by the transcript filed in this court such alternative writ or order to show cause ought to have issued. The judgment dismissing

the petition is reversed and the case is remanded to the Circuit Court of Appeals for further proceedings, as herein indicated.

Reversed.